Supreme Court, U.S.
FILED
04-849 DEC 17 2004
OFFICE OF THE CLERK

No. 04-____

IN THE

# Supreme Court of the United States

SHERRI WILLIAMS, B.J. BAILEY, *et al.*,

*Petitioners*,

—v.—

ATTORNEY GENERAL OF ALABAMA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court of Appeals erred in ruling that a state law criminalizing the sale of sexual devices, and thus burdening the private sexual conduct of consenting adults, is neither subject to heightened scrutiny, in contrast to decisions by at least two state courts of last resort, nor influenced by this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)?

## LIST OF PARTIES

Petitioners are Sherri Williams, B.J. Bailey, Dan Bailey, Benny G. Cooper, Deborah L. Cooper, Alice Jean Cope, Jane Doe, Jane Poe, and Jane Roe.

Respondent is the Attorney General of the State of Alabama.

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## OPINIONS AND ORDERS BELOW

The original decision of the District Court granting summary judgment to the plaintiffs, and enjoining Alabama Code § 13A-12-200.2(a)(1) (1975) (Supp. 2001), was entered on March 29, 1999. The court's opinion, 41 F. Supp. 2d 1257 (N.D. Ala. 1999) (*Williams I*), is reprinted in the Appendix ("Pet. App.") at Pet. App. 1a-77a. The Eleventh Circuit decision reversing the District Court and remanding for further proceedings was entered on October 12, 2000. That opinion, 229 F.3d 1331 (11th Cir. 2000), was withdrawn and is not reprinted in the appendix. On January 31, 2001, the Eleventh Circuit issued a superceding opinion accompanying a denial of rehearing, 240 F.3d 944 (11th Cir. 2001) (*Williams II*), which is reprinted at Pet. App. 78a-97a.

On remand, the decision of the District Court granting summary judgment to the plaintiffs, and again enjoining Alabama Code § 13A-12-200.2 (a)(1)(1975) (Supp. 2001), was entered on October 10, 2002. The District Court's opinion, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (*Williams III*), is reprinted at Pet. App. 98a-195a. The Eleventh Circuit decision reversing the District Court was entered on July 28, 2004. It is reported at 378 F.3d 1272 (11th Cir. 2004) (*Williams IV*), and reprinted at Pet. App. 196a-249a. Rehearing and rehearing *en banc* were denied on September 24, 2004. Pet. App. 250a-251a.

## JURISDICTION

The Eleventh Circuit's decision reversing the District Court's grant of final summary judgment was entered on July 28, 2004. On September 24, 2004, that court entered an order denying plaintiffs' petition for rehearing and rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Alabama Code § 13A-12-200.2(a)(1) (1975) (Supp. 2001) provides: "It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as primarily useful for the stimulation of human genital organs for anything of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000)."

## STATEMENT OF THE CASE

This case involves a substantive due process challenge to an Alabama statute prohibiting the distribution

of "any device designed or marketed as useful primarily for the stimulation of human genital organs." Ala. Code § 13A-12-200.2(a)(1) (1975) (Supp. 2001) ("sexual devices"). Violations are punishable by fine and imprisonment. The statute does not restrict possession or use of a sexual device. The sexual devices covered by the statute have many recognized beneficial uses and are used by consenting adults in deeply private acts that are beyond the reach of government regulation. Petitioners allege that the Due Process Clause of the Fourteenth Amendment recognizes a protected liberty interest in sexual privacy that encompasses these activities. The asserted right necessarily includes the right to acquire these products, subject to the state's right to regulate them like other legal products marketed for adult use. Alternatively, petitioners allege that the statute is not rationally related to the governmental interests it purports to advance. A group of individuals who regularly use sexual devices with their spouses (or alone) and two retail distributors challenged the statute both on its face and as applied.

*The first District Court opinion* ("*Williams I*"). In the original district court opinion, Pet. App. 1a-77a, the court ruled that this Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), foreclosed the fundamental right of sexual privacy asserted by plaintiffs. The court also held that the asserted right found no support in the due process analysis required by *Washington v. Glucksberg*, 521 U.S. 702 (1997). The court nevertheless struck down the statute on the alternative ground that broadly prohibiting the sale of all sexual devices – regardless of the many beneficial uses acknowledged by the State – was not rationally related to any legitimate state interest. Pet. App. 76a-77a. The district court's extensive findings describing those beneficial uses were based on a stipulated evidentiary record. Pet. App. 6a-34a.

*The first Court of Appeals opinion* ("*Williams II*"). A panel of the court of appeals reversed. Pet. App. 78a-97a. The court first considered the district court determination that the statute was unconstitutional because it failed rational basis review. It held that "[t]he State's interest in public morality is a legitimate interest rationally served by the statute." Pet. App. 84a. The court reached this conclusion even though it recognized that the statute disregarded the many beneficial uses of sexual devices documented in the record. Pet. App. 90a ("However misguided the legislature of Alabama may have been in enacting the statute . . . [it] is not constitutionally irrational under rational basis scrutiny because it is related to the state's legitimate power to protect its view of public morality."). The court then considered plaintiffs' fundamental rights claim. After reviewing this Court's substantive due process cases, the Eleventh Circuit declined to find that the statute was unconstitutional in all of its possible applications, and therefore upheld the statute on its face. Pet. App. 91a-95a.

The Eleventh Circuit remanded the case for further proceedings on plaintiffs' as-applied challenge, however, noting that the district court had not adequately considered the as-applied challenge raised by the plaintiffs under *Glucksberg*, because it failed to sufficiently weigh the important interests in marital and sexual privacy that were threatened by the statute. Pet. App. 95a-97a.

In ordering a remand, the appeals court specifically rejected the approach taken by the district court, which focused its due process analysis on whether the use of sexual devices is conduct that, by *itself*, is "deeply rooted in this Nation's history" and "implicit in the concept of ordered liberty," and remanded for a determination of whether and to what extent the Alabama statute infringes a "fundamental right to sexual privacy" that includes the right of these

plaintiffs to use sexual devices in the privacy of their bedrooms. Pet. App. 96a-97a.

Although the court in *Williams II* did not decide the fundamental rights issue, the court plainly recognized the important interests in sexual privacy implicated by this case:

> the as-applied challenges raised by the plaintiffs, married or unmarried, implicate different and important interests in sexual privacy. *See Griswold*, 381 U.S. at 485-86, 85 S. Ct at 1682 ("Would we allow the police to search the sacred precincts of the marital bedrooms? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); . . . [*Bowers v. Hardwick*, 478 U.S. 186,] 216, 106 S. Ct. at 2857 (Stevens, J., dissenting) (citing *Eisenstadt* and *Carey* as holding that fundamental rights protection in sexual matters "extends to intimate choices by unmarried as well as married persons").

Pet. App. 95a-96a.

Consistent with that view, the district court was specifically directed to consider, as part of the *Glucksberg* test, "whether our nation has a deeply rooted history of state interference, or state *non-interference*, in the private sexual activity of married or unmarried persons [or] whether contemporary practice bolsters or undermines any such history." Pet. App. 97a (emphasis added).

*The second District Court opinion* ("*Williams III*"). On remand, the district court carefully applied the due process analysis required by *Glucksberg* and by the panel decision. In order to avoid mischaracterizing the asserted liberty interest, the court started its analysis with a careful description of the rights at stake by focusing on the marital

and sexual privacy interests of the individual plaintiffs. The court's discussion begins and ends with a thorough assessment of how the Alabama statute affects the lives and sexual practices of the individual plaintiffs in this case. Pet. App. 108a-115a, 190a-191a.

The district court findings show how sexual devices aid in the most intimate acts between husbands and wives and other consenting adults. Pet. App. 108a-115a, 175a-176a, 190a-191a. The court relied on the testimony of each of the user plaintiffs in this case describing how the use of sexual devices during marital and dating relationships has enabled them to, among other things, improve the quality of their marital communications, better their sexual relationships, encourage intimacy in their marital relationships, eradicate fears of infidelity between spouses, and combat embarrassing or painful medical conditions. Pet. App. 190a-191a. Additionally, the court adopted the stipulated testimony of two experts in the study of human sexuality describing how "sexual aids help in the revitalization of potentially failing marital relations," and explaining that the use of sexual devices is recommended in "therapy for couples who are having sexual problems in their marriage." Pet. App. 191a (internal quotations omitted). The lower court held that the undisputed evidentiary submissions supported the conclusion that the user plaintiffs' purchase and use of sexual devices is an integral part of the sexual relationships they share with their spouses and other partners. Pet. App. 175a-176a, 190a-191a. And the court held that these facts supported plaintiffs' contention that "[t]aken as a whole, these devices are designed to improve or enhance sexual relations or provide an alternative to them." Pet. App. 176a.[1]

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[1] One of the plaintiffs, Jane Doe, is a fifty-year-old woman who now is single, but who previously has been married and divorced.

The use of these devices is particularly important and therapeutic for women who have difficulty achieving orgasm through coitus alone. Pet. App. 111a, 149a; *see also* Pet. App. 17a-18a, 20a. The individual plaintiffs courageously testified to that effect both in the original district court proceedings and on remand. Pet App. 14a-15a, 111a-115a.

As the district court found, the inability to achieve orgasm through sexual intercourse is a recognized and treatable medical condition. In the opinion of some medical and psychological professionals, failure to treat the condition may not only jeopardize the women's physical and physiological health, but may also destroy a marriage or relationship. For this reason, many married and unmarried couples seek out therapy or advice on how to treat this condition. Pet. App. 191a; *see also* Pet. App. 17a-18a, 20a. In fact, standard vibrator devices have FDA approval as a powered vaginal muscle stimulator for therapeutic use in increasing muscular tone and strength in the treatment of sexual dysfunction or as an adjunct to Kegel exercise

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Ms. Doe began using sexual devices on the advice of her therapist, as a means to combat postpartum depression and to improve her marital relationship. Ms. Doe currently uses the devices to avoid sexually transmitted diseases, while remaining sexually active. Another plaintiff, Deborah L. Cooper, is thirty-three years old, and married to plaintiff Benny G. Cooper. The Coopers began using sexual devices in order to repair their deteriorating sexual relationship and marriage. To that end, Mrs. Cooper attended an "adult toy" party at a friend's home, at which she purchased a sexual device that she subsequently introduced into her marriage. Both Mr. and Mrs. Cooper attribute the use of sexual devices to "restoring . . . trust, dialogue, and understanding into their marriage." A third plaintiff, Dan Bailey, is sixty-one, and fourteen years older than his wife. He has suffered in recent years from a respiratory condition and problems with arousal. Mr. Bailey asserts that the use of sexual devices has improved his sexual relationship with his wife.

(tightening of the muscles of the pelvic floor to increase muscle tone). Pet. App. 174a; *see also* Pet. App. 10a-20a.[2]

Other plaintiffs use sexual devices because of physical disabilities.[3] The district court also noted that the State of Alabama's own University Health System Internet site advocates applying a "powerful vibrator on the glans of the penis" to enable men who have suffered spinal cord injuries to ejaculate, for the specific purpose of "impregnate[ing] their wives and hav[ing] normal, healthy children." Pet. App. 191a.

As part of its *Glucksberg* analysis, the district court also made extensive findings describing the widespread use and availability of sexual devices in contemporary America. The court found that vibrators have been mass marketed since 1899 and were even advertised in the *Sears Roebuck Catalogue*. Pet. App. 153a-154a, 170a. At first their use was coupled with a misunderstanding of female sexuality, which led them to be commonly used and recommended by doctors for the treatment of "hysteria." Pet. App. 148a-150a. Today, the use of sexual devices is coupled with a greater understanding of both male and female sexuality that has led

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[2] 21 C.F.R §§ 884.5940, 884.5960 (2004).

[3] For example, plaintiff Jane Roe suffers from a chronic disability that makes it extremely painful to engage in sexual intercourse. Ms. Roe, who is thirty-eight years old, has lived with this condition since she was twenty-four, and claims that sex has become increasingly less enjoyable since that time. Ms. Roe asserts, however, that she was invited to an "adult toys" party, at which she was able to discuss her condition with other women in a "private, supportive environment." Ms. Roe purchased sexual devices at this party that allow her to experience sexual pleasure without pain or discomfort. This plaintiff states that, while she hopes to marry or have a consistent sexual partner in the future, any sexual relationship will require her partner to use such a sexual device to enable her to experience sexual pleasure without pain. The other user plaintiffs describe similar issues. Pet. App. 112a-115a.

to their acceptance in virtually every part of the country – including Alabama. Moreover, the State did not contest the evidence that approximately twenty percent of all American women occasionally use a vibrator, and at least ten percent of sexually active adults use vibrators in their regular sex life. Pet. App. 170a; *see also* Pet. App. 33a. Many other findings in the court's original decision are addressed to the widespread use and availability of sexual devices in America and in Alabama. Pet App. 8a-34a. Sex boutiques specializing in romance enhancing products and novelties operate in every major city in Alabama and throughout the United States. Moreover, the products continue to be advertised in the print and Internet media, such as airline magazines, *Cosmopolitan*, and such upscale mail-order catalogues as the *Sharper Image*. Pet. App. 170a. The district court further found that only two states other than Alabama (Georgia and Texas) restricted the distribution of sexual devices. *Id.*

Following its discussion of the beneficial uses of sexual devices in deeply private acts, the district court turned to the second part of the *Glucksberg* analysis and found that there exists a substantial history, legal tradition, and contemporary practice of deliberate state non-interference in the private, consensual, sexual relationships of married and unmarried adults. Pet. App. 171a-175a. The district court's findings not only describe the prevailing legal norms during the period studied, but also the changing religious, scientific, social, and demographic forces that influenced our nation's legal traditions as they developed during the last 200 years.[4] By contrast, the only evidence introduced by the State established that during the Comstock era "rubber goods used

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[4] The stipulated evidence is based on both direct and secondary sources, including expert testimony and scholarship chronicling this history. Pet. App. 136a-170a.

for immoral purposes were sometimes confiscated."[5] Based on this evidence, and the Attorney General's concessions, the lower court concluded that this history, and these traditions and practices protected married and unmarried adults from intrusions into their sexual lives and behaviors. Pet. App. 171a-175a.[6] This is the precise issue that was returned to the lower court for additional findings. Pet. App. 95a-97a. The ultimate result, the court held, is that plaintiffs have shown that the fundamental right of privacy incorporates a right to sexual privacy that is abridged by the statute at issue.

Although the State failed to advance any justification for the statute or to argue that it was narrowly tailored, the court nevertheless considered a number of plausible justifications for the law. Pet. App. 183a-187a. Applying strict scrutiny, the court determined that even if the state asserted compelling interests underlying its enactment, the statute is not narrowly tailored to serve those interests and therefore does not pass constitutional muster. Pet. App. 187a-194a.

The first interest the court considered was the protection of children and unwilling adults from exposure to public displays of obscene materials and the prevention of the spread of adult-oriented establishments. The court held that communities can achieve this objective through the narrower option of zoning laws. In addition, the court held that any interest in protecting children and unwilling adults

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[5] This evidence was extremely thin and was contradicted by evidence showing that the enforcement of the Comstock laws primarily targeted contraceptive devices (womb shields and condoms) and obscene publications and pictures. Pet. App. 153a-154a.

[6] The court also held that, with few exceptions, history and contemporary practice demonstrate a deliberate and "conscious avoidance" of state regulation of these devices. Pet. App. 175a.

has no application to one of the vendor plaintiffs, who sells sexual devices at "Tupperware-style" parties in private homes. Pet. App. 189a-190a.

The second possible objective considered by the court was banning commerce in sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships. Pet. App. 190a-192a. The court rejected this justification as well. It held that, rather than being narrowly tailored to achieve this objective, the statute accomplishes just the opposite for the user plaintiffs, because it prevents them from access to devices "that they, and experts in the field of human sexuality, have averred are integral to growing, preserving, and/or repairing marital and familial relationships." Pet. App. 192a.

The court found that the statute also "sweeps too broadly" with respect to a third possible interest – banning commerce in obscene material. Pet. App. 192a-194a. Many of the devices at issue, the court noted, do not represent human genitals and would not be considered "obscene" under the guidelines of *Miller v. California*, 413 U.S. 15 (1973). The court held that although some of the devices might suggest sexual activity, "a mere suggestion of sex will not satisfy the *Miller* obscenity test." Pet. App. 194a.

Accordingly, the court granted plaintiffs' motion for summary judgment and denied the defendant's motion for summary judgment. The court entered judgment enjoining the Attorney General from enforcing the statutory provision in accordance with its memorandum opinion. Pet. App. 194a-195a.

*The second Court of Appeals opinion* ("*Williams IV*"). On the second appeal, the district court was again reversed in a 2-1 decision upholding the Alabama law. Pet. App. 196a-249a. Prior to oral argument, the parties were directed to file supplemental briefs addressing *Lawrence v.*

*Texas*, 539 U.S. 558 (2003), which was decided while this case was pending on appeal. In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down Texas' sodomy law, *Lawrence* acknowledged the substantive due process right of consenting adults to engage in private sexual conduct. Moreover, the *Lawrence* Court held that the premises upon which *Bowers* rested were erroneous and that the state's interest in "public morality" could no longer justify criminalizing private adult consensual sexual activity. 539 U.S. at 571.

The panel rejected any application of *Lawrence* to this case by reading the decision as solely establishing a bar to criminal prosecution for private adult consensual activity. Pet. App. 202a-203a. The majority did not acknowledge or identify the underlying liberty interest asserted in that case and declined to recognize the important liberty interests that support *Lawrence*. Pet. App. 202a-207a. The majority then turned to its *Glucksberg* analysis and engaged in the very analysis that was rejected in *Lawrence*, and by the first panel in *Williams II*. Pet. App. 207a-228a. The court characterized the asserted right at a level of specificity that demeans the sexual privacy rights that are at stake in this case. As a result, the majority repeated the error made in *Bowers*, and in the first district court opinion, by mistakenly reducing the liberty interest to a particular sexual act, untethered from the broader interests in sexual privacy that are protected by the Due Process Clause. The majority framed the question simply as whether the Constitution "protects the right to *use* sexual devices." Pet. App. 213a.[7]

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[7] As the majority acknowledged, there is no constitutional distinction between a ban on the private use of sex toys and a ban on the sale of sex toys. Pet. App. 213a. ("For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item.").

By shifting the emphasis to the seemingly trivial issue of whether the use of sexual devices rates constitutional protection, the majority avoided the very issue with which this Court was concerned in *Lawrence*.

The majority dismissed the district court's careful analysis of whether "our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons [or] whether contemporary practice bolsters or undermines such history," as "an irrelevant exploration of the history of sex in America." Pet. App. 214a. To the extent the *Williams IV* court engaged this issue at all, the majority opinion specifically rejected any application of the importance of state non-interference as a factor in the *Glucksberg* analysis. Pet. App. 217a-220a. Compounding its error, the majority ignored the importance of developments in the law in the 20th century and other contemporary practices that support the district court's conclusion that sexual privacy is constitutionally protected. Pet. App. 215a-217a.

The case was remanded yet again, Pet. App. 230a, this time for a determination of whether the Eleventh Circuit panel's decision in *Williams II*, which held that the Alabama law is supported by a rational basis (*e.g.*, public morality), remains good law now that *Bowers* has been overruled. Pet. App. 199a. The remand, however, was accompanied by instructions that so fundamentally alter the issue that plenary review by this Court is now appropriate.[8]

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[8] While acknowledging that "for purposes of constitutional analysis, restrictions on the ability to purchase an item [sexual devices] are tantamount to restrictions on the use of that item." Pet. App. 213a, the majority held that the State's justification for the statute can be judged by its secondary effects and not by the standards that would apply to a direct restriction on the use of sexual devices. Pet. App. 205a n.8 (commenting that there is nothing "private or consensual about the advertising and sale

Judge Barkett argued in dissent that *Lawrence* held that a state may not criminalize private adult sexual activity because of the existence of the very right to private sexual intimacy that the majority refused to recognize. Pet. App. 233a-237a. She further argued that the majority repeated the error made in *Bowers* by framing the due process issue in terms of the particular sexual act rather than the underlying right of sexual privacy. Pet. App. 238a-241a. Judge Barkett also took issue with the majority's crabbed view of the proper weight to be given to the *Glucksberg* factors, particularly the importance of contemporary practices and mores in due process analysis. Pet. App. 241a-246a. Finally, Judge Barkett argued that the State's reliance on public morality could not survive even rational basis scrutiny following *Lawrence*. Pet. App. 246a-248a.

## REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality is a legitimate state interest that is furthered by criminally burdening such private intimate activity. These premises directly conflict with the Court's holding in *Lawrence v. Texas*. The court of appeals compounded its error by rigidly applying the due process analysis of *Washington v. Glucksberg*, as if *Bowers* had not been overruled by *Lawrence*, and as if *Lawrence* had nothing to say about the

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of a dildo"). After framing the due process analysis in this way, the court suggested ample case authority for regulating sales, *id.*, notwithstanding the fact that it is plaintiffs' *use* that is burdened.

proper framing of the asserted liberty interest and the appropriate use of history as a guide.[9]

2. The lower courts are conflicted and confused about the limits imposed by the Constitution on the State's power to regulate adult, consensual sexual intimacy in the home. The panel decision directly conflicts with the decisions of the Colorado and Kansas Supreme Courts. Both of those decisions properly frame the asserted liberty interest in terms of the underlying right of sexual privacy in a way that is consistent with *Lawrence*, and inconsistent with the decision below. Four other State Supreme Courts have also reached divergent results about the scope of permissible regulation in this area. Louisiana has struck down a law similar to Alabama's, although on rational basis grounds. Texas, Georgia, and Mississippi have upheld statutes similar to Alabama's. Because States continue to enforce these statutes through criminal prosecutions, petitioners submit that there is a need for uniformity in this area of the law.

## I. This Case Raises Important Issues Concerning the Scope of the Constitutional Right to Sexual Privacy

In *Lawrence*, the Court considered a challenge to a Texas law that made certain sexual conduct between same-sex partners a crime. In striking down the law, the Court answered the question that the court of appeals had left open in *Williams II* – the same question the district court addressed on remand in this case – and held that the constitutional right to privacy and personal autonomy protects private, consensual sexual conduct, regardless of its

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[9] Related issues are raised in the pending petition for *certiorari* in *Lofton v. Secretary of the Florida Dep't of Children and Families*, No. 04-478.

connection to marriage or procreation. *Lawrence*, 539 U.S. at 574. To reach this result, the Court explicitly overruled *Bowers* and rejected the due process analytical framework that was used in that case. *Id.* at 578. The court of appeals in this case dismissed the relevance of *Lawrence* as an anomaly, and engaged in the very same flawed due process analysis that was used in *Bowers* and rejected in *Lawrence*. *Lawrence*'s repudiation of *Bowers*' substantive due process approach cannot be dismissed so casually.

*Lawrence* does indeed recognize the liberty interest asserted in this case. From its opening paragraph, the Court explained the importance of the liberty interest here:

> Liberty protects the person from unwarranted intrusions into a dwelling or other private places. In our tradition, the state is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the state should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief expression, *and certain intimate conduct*. The instant case involves liberty of the person, both in its spatial and transcendent dimensions.

*Id.* at 562 (emphasis added). After making this observation, the Court began its analysis by reviewing *Griswold v. Connecticut* 381 U.S. 479 (1965) and its progeny, in which the Court established the "right to privacy" in both marital and non-marital relationships and the right to "make certain fundamental decisions affecting [one's] destiny." 539 U.S. at 564-66. The Court explained that these cases established that "the right to make certain decisions regarding sexual

conduct extends beyond the marital relationship." *Id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)).

The Court then discussed its broad description of this right to "autonomy of the person" in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). It said that

> matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

*Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

The Court finally concluded that the fundamental right to privacy and personal autonomy established in these cases covers the right to sexual privacy unrelated to marriage or procreation, including same-sex sodomy. *Id.* The Court recognized that sodomy laws "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567. "[L]iberty," the Court said, "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572. Thus, the Court declared, using the words of Justice Stevens in his dissent in *Bowers*:

> [I]ndividual decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this

> protection extends to intimate choices by unmarried as well as married persons.

*Id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). "Justice Stevens' analysis," the Court said, "should have been controlling in *Bowers* and should control here." *Id.*

By refusing even to acknowledge the existence of the very liberty identified by Justice Stevens, the Eleventh Circuit in this case failed to follow a critical teaching of *Lawrence*. Judge Barkett's dissent properly criticized the majority for disregarding *Lawrence* and turning a reluctance to expand substantive due process into a "stubborn unwillingness" to consider relevant Supreme Court authority. Pet. App. 249a.

By asking "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," *Bowers v. Hardwick* framed the liberty interest too narrowly. *Lawrence*, 539 U.S. at 567. The *Lawrence* Court overruled *Bowers* because it had "fail[ed] to appreciate the extent of the liberty at stake" – namely, the right to engage in private sexual activity whether or not connected to marriage or procreation. *Id.* at 567. As in *Lawrence*, the Alabama statute imposes *criminal* sanctions and directly targets the private sexual activity of consenting adults by restricting the availability of sexual devices.

The evidence shows that this case is not about novelty items, naughty toys, or obscene matter. It is a case about human sexuality and extremely intimate acts. The court found that the use of sexual devices is uniformly credited by experts in the field of psychology and human sexuality, as well as by the plaintiffs themselves, as not only making sex more enjoyable, but improving self-esteem, health, and the relationships between men and women. Pet. App. 68a-70a. The State has never contested this basic

premise. The State has not argued that these products are inherently dangerous or that they are susceptible to misuse. The use of sexual devices is obviously not a crime in Alabama or anywhere else. In fact, the State has never even defended the statute on the grounds that sexual devices are obscene *per se*. Pet. App. 16a. Nor has it ever explained why sales of performance enhancing drugs like Viagra, Cialis, and Levitra and even ribbed condoms are not similarly prohibited. Pet. App. 16a-17a. Similarly the State has not sought to regulate the sale of sexual devices through valid zoning laws that apply to other adult businesses. Pet. App. 190a.

Having erred by proceeding as if *Lawrence* does not control the fundamental rights analysis and confirm a substantive due process right to sexual privacy, the Eleventh Circuit then compounded the error by applying the *Glucksberg* fundamental rights analysis as if *Lawrence* does not exist. The majority opinion conflicts with *Lawrence* in several critical respects that, taken alone or together, would lead to a different result in this case.[10] Whatever else may be said about the holding and meaning of *Lawrence*, the Court relied on several important factors that the panel ignored in this case. Judge Barkett's dissent flags all of them.

First, by ignoring *Lawrence*'s teaching about how to correctly frame a liberty interest affecting sexual privacy, the majority unnecessarily engaged in a *Glucksberg* analysis in search of the very right that was affirmed in *Lawrence*. The *Glucksberg* analysis applies where a court inquires whether to recognize a *new* fundamental right. The right asserted by plaintiffs here is part of the right previously recognized in *Griswold*, *Eisenstadt*, *Roe*, *Carey*, *Casey*, and *Lawrence*.

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[10] The majority's decision to ignore *Lawrence* compounded the error it made in failing to faithfully adhere to a decision of another panel of that court in *Williams II*.

Because the right is already established, there is no need to perform the *Glucksberg* analysis. Thus, the majority repeated the error made in *Bowers* by mistakenly reducing the asserted liberty interest here to a particular sexual act.

Second, even assuming that it was necessary to apply the *Glucksberg* analysis after this Court's decision in *Lawrence*, the *Williams IV* panel ignored this Court's instruction in *Lawrence* that, although history and tradition may be used as a "starting point," they are not the "ending point" of substantive due process inquiry. *Lawrence*, 539 U.S. at 572. Except for the overruled *Bowers*, this Court has not relied upon the existence of historical legislative restrictions on private sexual conduct to suggest that the liberty interest asserted in this case has not been established.

Third, the court below suggested that recognizing a right to "sexual privacy" in this case would theoretically require the states to recognize a fundamental right to sexual privacy in all circumstances. Pet. App. 210a. Here again, the majority misreads *Lawrence*, which recognized both the broad scope of the existing liberty and the limits of the question presented in any particular case. 539 U.S. at 578. Like *Lawrence*, the present case does not "involve minors, it does not involve persons who might be injured or coerced, or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution." *Id.* The case does involve adults who, with full and mutual consent, engage in sexual practices that assuredly are in and of themselves protected under the Fourteenth Amendment. This Court should grant the writ sought in this case to reaffirm that this essential zone of personal privacy cannot be abridged by the government.

## II. The Eleventh Circuit's Decision Is Evidence of the Conflict and Confusion Among Lower Courts with Respect to This Issue, and the Need for Guidance from This Court.

The Eleventh Circuit's decision in *Williams IV* adds to a conflict among lower courts with regard to the constitutional issues raised by these kinds of statutes. In striking down the sexual devices statutes in their states, the Supreme Courts of Colorado and Kansas engaged in the correct analysis of the liberty interests at stake. *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990). By contrast, the Supreme Court of Louisiana, while failing to recognize that its state sexual devices law burdened a fundamental right, struck down the statute on the ground that the State had no rational basis for restricting the sale of devices with well-established therapeutic value. *State v. Brenan*, 772 So. 2d 64 (La. 2000). Finally, the Texas Court of Criminal Appeals flatly rejected the argument that any fundamental right was implicated by the state's sexual devices law, and sustained the statute as a rational exercise of the state's power. *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985). The Court should grant the writ to resolve the conflict among these authorities.

### A. Colorado

The Colorado Supreme Court considered a federal constitutional challenge to a state law that criminalized the "[p]romot[ion] or possess[ion] with intent to promote any . . . obscene device," which was defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." 697 P.2d at 369-70 (discussing Colo. Rev. Stat. §§ 18-7-101 and -102). The court began its analysis by observing that "the liberty interest protected by the Due Process Clause of the

United States Constitution encompasses a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Id.* (citing, *inter alia*, *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)). Applying this first principle to the facts before it, the court found that the "blanket proscription" on all devices "designed or marketed as useful primarily for the stimulation of human genital organs" impermissibly equated sex with obscenity, and consequently "invaded the 'personal intimacies of the home.'" *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973)). Moreover, the law infringed on a "sphere of constitutionally protected privacy which encompasses the intimate medical problems associated with sexual activity." *Id.* at 369 n.26 (citing *United States v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123, 127 n.4 (1973)). The court cited regulations from the federal Food and Drug Administration regarding sexual devices in support of its conclusion that the law burdened the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices." *Id.* at 370, n.27.

Having determined that a fundamental liberty interest was burdened by the statute, the court then examined the government interests that might justify this burden. Ultimately, the court ruled that the government had demonstrated "no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways." *Id.* at 370. The court instructed the legislature that "[a]ny statutory scheme [regulating these devices] . . . must be compatible with the right of a person to engage in sexual

activities to the extent that right is encompassed within the constitutional right of privacy." *Id.* at 370, n.28.[11]

B. Kansas

When faced with a similar law classifying sexual devices as obscene and criminalizing their sale, the Kansas Supreme Court reached the same conclusion. The court held that the law under which the defendant had been prosecuted "impermissibly infringe[d] on the constitutional right of privacy in one's home or one's doctor's or therapist's office." *State v. Hughes*, 792 P.2d 1023, 1032 (Kan. 1990). In reaching this conclusion, the court relied extensively on the testimony of Dr. Douglas Mould, a state certified psychologist and sex therapist. *Id.* It also relied on the authorities discussed by the Colorado Supreme Court in *Seven Thirty-Five*, and concurred with that court's conclusion that a statute is impermissibly overbroad when it impinges, without justification, on the sphere of constitutionally protect privacy that encompasses the use of sexual devices as therapy for medical and psychological disorders. *Id.* at 1031. Acknowledging the importance of the liberty interests at stake, the court concluded with the following admonition:

> When a state chooses to regulate matters involving sensitive rights of its citizens, it is obligated to do so in a manner that bears a real and substantial relationship to the objective sought, *Nebbia v. New York*, 291 U.S. 502 (1934), and is narrowly drawn to express only those objectives, *Carey v.*

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[11] The court reserved for another day the broader question of whether any regulation on the use and sale of these devices could pass constitutional muster. 697 P.2d at 370, n.28.

*Population Services International*, 431 U.S. 678, 686 (1977).

*Id.* at 1032. Because the State had demonstrated "no interest in the broad prohibition of distributing the [sexual] devices in question sufficiently compelling to justify the infringement of the rights of those seeking to use them in legitimate ways," the court found the statute inconsistent with the guarantee of liberty contained in the due process clause of the federal constitution. *Id.*

C. Louisiana

When presented with a constitutional challenge to a state law prohibiting the promotion of sexual devices, the Louisiana Supreme Court did not adopt the fundamental rights analysis applied by the Kansas and Colorado Supreme Courts. *State v. Brenan*, 772 So. 2d 64, 69-70 (La. 2000). Noting that this Court has not yet decided definitively "whether lawful, private, sexual conduct is sheltered from state interference by the Constitution," the court insisted that it had no occasion to determine whether "the government can regulate aspects of non-commercial sexual activity." *Id.* at 72, n.5 (citing *Carey*, 431 U.S. at 689, n.5).[12] As a result, the court concluded that the restriction on advertising did not implicate any federally protected fundamental rights. *Id.* at 72.

Nevertheless, the court struck down the statute using the more lenient rational basis standard of review, finding that the prohibition did not bear any rational relationship to

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[12] *Brenan* obviously predated this Court's decision in *Lawrence*, and it is unclear whether the Louisiana Supreme Court would have viewed *Lawrence* as answering this question.

the State's interest in promoting morals and public order.[13] As an initial matter, the court observed that "the legislature cannot make a device automatically obscene merely through the use of labels." *Id.* at 74. The court then recounted evidence ranging from the FDA regulations to the testimony of experts from the scientific community demonstrating that sexual devices have significant therapeutic value. *Id.* at 75-76. Ultimately, the court concluded that, "[g]iven these therapeutic uses, we cannot say that the State's actions in banning all devices that are designed or marketed primarily for the stimulation of the human genitals without any review of their prurience or medical use is rationally related to the 'war on obscenity.'" *Id.* at 76.

D. Texas

The Texas Court of Criminal Appeals, by contrast, both applied the wrong analysis and reached the wrong result in a challenge to that state's sexual devices law. *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985). When considering the question of whether a fundamental right was burdened by the challenged statute, the majority justified its distinction between contraceptives and other types of sexual devices by noting that the former fell within the realm of constitutionally protected liberty because they directly implicated the decision to bear or beget a child, whereas the latter did not. *Id.* at 265. Because the statute did not implicate any fundamental liberty interest, the court then engaged in a rational basis review of the sexual devices statute, and determined that it could be justified as a legitimate exercise of the state's police powers. *Id.* (finding that state had an interest in "suppressing traffic in obscene expression," and could act to protect the "'social interest in

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[13] Again, because this decision predated *Lawrence*, the court assumed that public morality standing alone was a sufficient justification under rational basis review.

order and morality' or 'decency'" by outlawing sexual devices) (internal citations omitted).

The dissenting judges, however, expressed frustration at the majority's overly constrained framing of the relevant issue. As Judge Clinton noted in his dissent, the question was not whether there was a fundamental right "to stimulate human genital organs with an object designed or marketed as useful primarily for that purpose." *Id.* at 266 (Clinton, J., dissenting). Rather,

> the question is more properly framed as follows: Whether the constitutional right of personal privacy is broad enough to encompass a person's decision to engage in private consensual sexual activity that includes stimulating human genital organs with an object designed to be primarily for that purpose.

*Id.* at 267. Foreshadowing this Court's decision in *Lawrence*, Judge Clinton commented that if the decision to engage in private sexual conduct is in fact "among the most private and sensitive," then the right of the individual, married or single, to make this decision in the first instance, free from government intrusion, "must be practically invulnerable." *Id.* At a minimum, Judge Clinton observed, the exercise of this right cannot be infringed simply by "the social interest in order and morality." *Id.* (internal quotation and citation omitted).

* * *

The issue presented in this case is not a mere academic exercise. To the contrary, people have been, and continue to be, prosecuted under these statutes. *See Morrison v. State*, 526 S.E.2d 336 (Ga. 2000) (ruling that there is "no constitutional right to distribute obscene

material"); *Regalado v. State*, 872 S.W.2d 7, 9 (Tex. App. 1994) (rejecting an appeal from a conviction under the obscene devices law by ruling that "[t]here is no fundamental right to use obscene devices; therefore, restricting the promotion of such devices does not infringe on any recognized fundamental right"); *State v. Sewell*, 233 S.E.2d 187 (Ga. 1977) (accepting state's classification of sexual devices as *per se* obscene, and rejecting defendant's constitutional defenses to prosecution), *appeal dismissed for want of substantial fed'l question*, 435 U.S. 982 (1978).[14]

Declaratory actions brought by those who face prosecution have also been rebuffed. *See PHE, Inc. v. State*, 877 So. 2d 1244, 1248 (Miss. 2004) (finding "no independent fundamental right of access to purchase sexual devices"); *This, That and the Other Gift and Tobacco, Inc. v. Cobb County*, Civ. Action 1:00-CV-2920-WBH (Nov. 8, 2004) (N.D. Ga.) (rejecting constitutional challenge to sexual devices law, but expressing uncertainty as to whether the furtherance of public morality is a sufficient rational basis to sustain statute criminalizing distribution of sexual devices against constitutional challenge).

In *Lawrence*, this Court reiterated in the clearest of terms that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S.

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[14] On the strength of this Court's dismissal of the appeal in *Sewell*, the Fifth Circuit rejected a challenge to the Texas sexual devices law. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1028 (5th Cir. 1981). Citing a paucity of evidence in the record developed at trial, the court also refused to consider an equal protection claim regarding the effect of this statute on handicapped individuals who wished to use sexual devices in the privacy of their home. *Id.* ("With nothing more than the naked legal conclusions on the record, we have no evidentiary basis to sustain the plaintiffs' proposed extension of the constitutional guarantee of personal autonomy.").

at 847). As explained above, lower courts are interpreting *Lawrence* in an improperly narrow manner, which is adding to a split of authorities regarding a State's power to interfere with an individual's personal choices regarding private, consensual sexual activity. The Court should grant the writ sought in this case to provide additional guidance with respect "to the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults." *Carey*, 431 U.S. at 688, n.5.

## CONCLUSION

For the reasons stated above, the Court should grant *certiorari*. In the alternative, if the Court grants review in *Lofton v. Secretary of the Florida Department of Children and Families*, No. 04-478, it should hold this case until it resolves the merits of that case because of the common issues raised by both cases. *See supra* note 8.

Respectfully Submitted,

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Dated: December 17, 2004

# APPENDIX

**APPENDIX A**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

Civil Action No. 98-S-1938-NE

SHERRI WILLIAMS, B.J. BAILEY, BETTY FAYE HAGGERMAKER, SHERRY TAYLOR-WILLIAMS, ALICE JEAN COPE, and JANE DOE,

*Plaintiffs*,

v.

BILL PRYOR, in his official capacity as the Attorney General of the State of Alabama,

*Defendant.*

March 29, 1999

**MEMORANDUM OPINION**

The Alabama Legislature enacted an "Anti-Obscenity Enforcement Act" during the Regular Session of 1989. The Act subsequently was codified at Alabama Code §§ 13A-12-200.1 to -200.10 (1975) (1994 Replacement Volume). Nine years later, during the 1998 Regular Session, the Alabama Legislature amended various provisions of the Act through passage of Alabama Act No. 98-467.[1] Among other changes wrought, section 6 of Act No. 98-467 extended Alabama Code § 13A-12-200.2[2]—which previously had applied only

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[1] Act No. 98-467 was enacted on April 29, 1998, with an effective date of July 1, 1998.

[2] Prior to amendment, Ala. Code § 13A-12-200.2 (1975) (1994 Replacement Volume) read as follows:

to the "distribution" of "obscene material"[3]—so as to criminalize the distribution of "any device designed or

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**§ 13A-12-200.2. Distribution, possession with intent to distribute, production, etc., of obscene material prohibited; penalties.**

(1) It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material for any thing of pecuniary value. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $10,000 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year.

(2) It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material for any thing of pecuniary value. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $20,000 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year.

(3) It shall be unlawful for any person to knowingly produce, or offer or agree to produce, any obscene material for any thing of pecuniary value. Any person who violates this subsection shall be guilty of a Class C felony. (Acts 1989, No. 89-402, p. 791, § 4.)

[3] The terms "obscene," "material," and "distribute" were defined in Ala. Code §§ 13A-12-200.1(1), (2), and (3), reading as follows:

(1) OBSCENE. Such term means that:

a. The average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest; and

marketed as primarily useful for the stimulation of human genital organs...."

> **(a)(1)** It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not

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b. The material depicts or describes, in a patently offensive way, sexual conduct, actual or simulated, normal or perverted; and

c. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political or scientific value.

(2) MATERIAL. Any book, magazine, newspaper, printed or written matter, writing, description, picture, drawing, animation, photograph, motion picture, film, video tape, pictorial representation, depiction, image, electrical or electronic reproduction, broadcast, transmission, telephone communication, sound recording, article, device, equipment, matter, oral communication, live performance, or dance.

(3) DISTRIBUTE. To import, export, sell, rent, lend, transfer possession of or title to, display, exhibit, show, present, provide, broadcast, transmit, retransmit, communicate by telephone, play, orally communicate or perform.

> more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

1998 Ala. Acts 98-467, § 6, now codified at Alabama Code § 13A-12-200.2(a)(1) (Supp. 1998) (emphasis added to language added by amendment).

For convenience, this court shall hereafter refer to the statutory prohibition pertaining to "any device designed or marketed as primarily useful for the stimulation of human genital organs" in an abbreviated form, by the use of the phrase "sexual devices," or sometimes "proscribed devices."

Six plaintiffs bring this action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Alabama Code § 13A-12-200.2(a)(1), as thus amended. These plaintiffs may be bifurcated into discrete groups, each averring potential harm from enforcement of the challenged statute: (1) vendors of sexual devices (the "vendor plaintiffs"); and (2) persons who use such devices (the "user plaintiffs").

The first group includes plaintiffs Sherri Williams and B. J. Bailey. Williams is the principal shareholder of "Pleasures," an Alabama corporation that owns and operates two retail stores located in Huntsville and Decatur, Alabama, respectively, both of which display and sell sexual devices and novelties. Bailey is the principal investor in "Saucy Lady, Incorporated," an Alabama corporation selling sexual devices and novelties, including vibrators, lubricants, and oils, through in-home "'Tupperware'—style parties." These

vendor plaintiffs fear criminal prosecution under the subject statute, and seek injunctive relief barring enforcement of it. They also seek to bring suit on behalf of their customers, who allegedly are reluctant to come forward "because of the sensitive and intimately personal nature of the reasons for using the product[s]." (Complaint, Doc. No. 1, ¶ 18.)

The second group of plaintiffs includes Betty Faye Haggermaker, Sherry Taylor-Williams,[4] Alice Jean Cope, and Jane Doe. Each of these persons avers that she personally uses sexual devices either for therapeutic purposes related to sexual dysfunction, or as an alternative to sexual intercourse. (*Id.*, ¶¶ 29-33.)

All plaintiffs seek to enjoin Bill Pryor, the Attorney General of the State of Alabama,[5] from enforcing Alabama Code § 13A-12-200.2(a)(1).[6] They contend implementation of that statute will infringe upon their fundamental right to privacy and personal autonomy secured by the United States Constitution. Plaintiffs further argue that the challenged legislation does not bear a reasonable relationship to a proper legislative purpose.

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[4] The court offers as a point of clarification that plaintiff Sherry Taylor-Williams is an individual resident of Alabama, whereas plaintiff Sherri Williams is an individual resident of Florida.

[5] In their complaint, plaintiffs also named Timothy W. Morgan, the District Attorney of Madison County, Alabama, as a defendant. Morgan has since been dismissed, however, in accordance with a stipulation of dismissal filed by plaintiffs on December 3, 1998. (Document No. 32.)

[6] "Federal courts [may] enjoin state officials to conform their conduct to requirements of federal law." Milliken v. Bradley, 433 U.S. 267, 289, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). The doctrine of *Ex parte* Young, 209 U.S. 123, 159-60, 28 S.Ct. 441, 426, 52 L.Ed. 714 (1908), allows a federal suit for prospective injunctive relief against a state official, challenging the constitutionality of a state official's action in enforcing state law. *See* Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985).

Plaintiffs initially sought a temporary restraining order, but formally withdrew that request on September 9, 1998, following an agreement among the parties stipulating that "the status quo would be maintained and the amendments not enforced with respect to plaintiffs' [*sic*], pending the Court's determination following a hearing on plaintiffs' claims for preliminary injunctive relief." (Plaintiffs' request for expedited scheduling conference, Doc. No. 27, at ¶ 2.) No state adjudication has occurred, and none is pending. The matter presently is before the court on plaintiffs' motion for permanent injunctive relief.[7]

## OUTLINE OF DISCUSSION

I. STATEMENT OF UNDISPUTED FACTS
   - A. The Vendor Plaintiffs
     1. Sherri Williams and "Pleasures"
     2. B.J. Bailey and "Saucy Lady, Incorporated"
     3. Other vendors of sexual devices
   - B. The User Plaintiffs
     1. Betty Faye Haggermaker
     2. Sherry Taylor-Williams
     3. Alice Jean Cope
     4. Jane Doe
   - C. Relevant Provisions of Alabama Law
   - D. Condoms, Virility Drugs, and Masturbation
   - E. Recognized Therapeutic Uses of the Proscribed Devices
     1. Federal Food and Drug Administration regulations
     2. Booksellers, magazine publishers, gift shops, and Internet websites

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[7] By means of an order entered on December 9, 1998 (Doc. No. 31), this court advanced the hearing on plaintiffs' motion for declaratory judgment and preliminary injunctive relief to a final hearing on the merits.

3. Alfred Jack Turner, Ph.D.
4. Pepper Schwartz, Ph.D.

II. ANALYSIS OF THE PARTIES' CONTENTIONS

A. Standing to Sue

B. Framework of Analysis for Substantive Due Process Claims

C. Does the Alabama Act Infringe on a Fundamental Right?

1. Background: fundamental rights generally
2. Plaintiffs' assertion of a fundamental right
3. The Attorney General's response
4. Decisions of other courts faced with this issue
5. Breadth of the fundamental right to privacy

D. Rational Basis Review

1. Conceivable state interests
2. Are the interests legitimate?
   a. Banning public displays of obscene material
   b. Banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships"
   c. Banning commerce of obscene material
3. Is Alabama Code § 13A-12-200.2(a)(1) rationally related to these legitimate state interests?
   a. Banning public displays of obscene material
   b. Banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships"

c. Banning commerce of obscene material
   (1) What can be classified as "obscene"?
   (2) What are the devices "designed or marketed as useful primarily for the stimulation of human genital organs"?
   (3) Are these devices obscene?

III. CONCLUSION

## I. STATEMENT OF UNDISPUTED FACTS

The stipulation of facts filed by the parties on December 3, 1998, is set forth in full immediately below.[8]

### A. The Vendor Plaintiffs

### 1. Sherri Williams and "Pleasures"

1. Plaintiff Sherri Williams is a resident of Florida and the owner and operator of "Pleasures," an Alabama corporation doing business in Alabama. "Pleasures" has two retail stores in Alabama, one located in Huntsville and one in Decatur. Sexual aids and novelties are displayed and sold at these locations.

2. The "Pleasures" store in Huntsville has been in operation since June, 1993. It is located on a main thoroughfare of Huntsville in a small shopping mall within a retail business district. It is adjacent to other retail stores which include an adult video store, a liquor store, a hair

[8] This court added the descriptive headings set out in boldface type.

salon, a spa, an O'Charley's restaurant[,] and also a WalMart Super Center just 150 feet to the rear.

3. The "Pleasures" store in Decatur has been in operation since February, 1996. It is located on a main thoroughfare of Decatur in a small shopping mall within a retail business district. It is adjacent to other retail stores, which include a Texaco, a chiropractor's office, a pet grooming facility, a tanning salon, a printer, a specialty kite shop[,] and a women and children's linen clothing store.

4. Both stores have brick storefronts with large display windows which commonly display lingerie, massage oils, adult games, hosiery, instructional videos, bath powders, aromatherapy candles, romance novels, etc. They also have standard wood signage on the glass front doors stating, "If offended by explicit sexuality, Please do not enter, You must be 21 years of age."

5. The products in both stores are displayed openly in much the same way [that] products are displayed in a novelty store.

6. The product line in both stores is adult oriented and persons under the age of 21 are not permitted entry.

7. Both stores are strictly retail. There are no sexual performances or video shows. The only services offered are counseling on use of the product and the additional sale of cakes, chocolates, and similar foods and various types of coffee.

8. "Pleasures" does not purport to operate as or resemble an adult bookstore, although a limited number of adult oriented "soft porn" or "R" rated videos and magazines are sold.

9. The products sold at both stores include novelty products with an adult theme, and items that are marketed to facilitate sexual relations, such as condoms, lubricants, and vibrators. A complete inventory list of the product[s] available at "Pleasures" is attached.[9] Some of the products sold may, Ms. Williams believes, be covered by the statute, which Ms. Williams believes may subject her, and/or her agents, to arrest and prosecution.

10. "Pleasures" offers a large variety of romance orientated products marketed simply as "Adventures in Romance." The product line represents the intimate, private, and personal relations of the clientele. "Pleasures" promotes an extensive line of lingerie, exotic oils, lotions, and lubricants, gourmet chocolates, instructional video and reading materials, marital aids, vibrating and non-vibrating sexual aids.

11. There have been no arrests of Sherri Williams, or her agents, in connection with the operation of "Pleasures."

12. The "Pleasures" store in Huntsville has approximately 14,960 customers annually. In 1997, approximately 22,440 items were sold, generating gross revenue of approximately $448,837.00. Through July 1, 1998, approximately 10,060 items were sold, generating gross revenue of approximately $201,314.00.

13. The "Pleasures" store in Decatur has approximately 5,600 customers annually. In 1997, approximately 8,455 items were sold, generating gross revenue of approximately $169,093.00. Through July 1,

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[9] Plaintiffs belatedly filed the inventory list (Doc. No. 40, Exhibit A) on March 19, 1999.

1998, approximately 5,170 items were sold, generating gross revenue of approximately $103,438.00.

14. Customer interest in the products is varied. Many use these products to avoid the possibility of sexually transmitted diseases; while others use the products to better stimulate intimate relationships with partners; there are those who use the products to achieve sexual satisfaction not otherwise available to them; and some use these products for temporary or long-term sexual satisfaction when a partner is not otherwise available. Many of "Pleasures'" customers have even been referred to the store by therapists treating them for sexual dysfunction or marital problems.

**2. B. J. Bailey and "Saucy Lady, Incorporated"**

15. Plaintiff B.J. Bailey is a resident of the State of Alabama and the owner and operator of "Saucy Lady, Incorporated," an Alabama corporation doing business in Alabama. "Saucy Lady, Incorporated," conducts in-house "Tupperware"-style parties at which sexual aids and novelties are displayed and sold.

16. "Saucy Lady, Incorporated," has been conducting parties throughout Alabama since 1995, and prior to incorporation since 1993.

17. "Saucy Lady" parties are conducted in the privacy of a host home and are marketed exclusively to adult women. Attendance is generated largely through word of mouth. No advertising is conducted.

18. In 1997, approximately 770 "Saucy Lady" parties were conducted throughout the [S]tate of Alabama. Through July 1, 1998, approximately 380 parties were conducted.

19. "Saucy Lady" parties were conducted in the following counties in 1997-1998: Lauderdale; Lawrence; Limestone; Madison; Jackson; Franklin; Morgan; Marshall; Walker; and Shelby.

20. Attendance at "Saucy Lady" parties ranges from 3 to 35. Total attendance in 1997 was approximately 7,700. Total attendance in 1998 (through July 1st) was approximately 3,800.

21. At "Saucy Lady" parties, sexual paraphernalia, aids and novelties are sold. A list of the product line is attached.[10] Some of these products may, Ms. Bailey believes, be covered by the statute, which Ms. Bailey believes may subject her[,] and/or her agents, to arrest and prosecution.

22. In 1997, approximately 10,500 products were sold, generating revenue of approximately $160,000.00. In 1998, through July 1st, approximately 5,250 products were sold, generating revenue of approximately $80,000.00.

23. There have never been any arrests in connection with "Saucy Lady" parties.

24. "Saucy Lady, Incorporated," does not advertise its business, which grows from referrals from parties. Ms. Bailey is invited into a host's home, where she shares "romance-enhancing" information for an hour with the guests who attend the party.

25. Ms. Bailey is self-taught, and makes no claim to be a counselor of any kind. If Ms. Bailey becomes aware of extreme cases of sexual dysfunction, she refers them to a

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[10] Plaintiffs belatedly filed the product list (Doc. No. 40, Exhibit B) on March 19, 1999.

medical doctor and/or psychotherapist. She also refers women who report abuse to the local women's shelter, Hope Place. Ms. Bailey describes her business as focused on ways to help couples make their marriage stronger through better communication, by understanding each other's bodies[,] and by considering how their partner views their intimate relationship.

26. "Saucy Lady" customers include married, single[,] and divorced adult women from 19 to 70 years of age (thus far), and of diverse religious, racial, and ethnic backgrounds, and varied professions and occupations. These women vary greatly in their level of sexual experience and knowledge. If called to testify, Ms. Bailey would testify that the majority of women who attend her parties have shared with her that they were either anorgasmic or had extreme difficulty reaching orgasm through sexual intercourse alone. Some of these customers have consulted a doctor or therapist about these issues. A great many customers have reported to Ms. Bailey that the products they purchased helped them to become orgasmic and greatly improved their marital and sexual relations.

27. If called to testify, Ms. Bailey would testify that many women have also shared with her that they wished to avoid sexual relations with others because of the risk of sexually transmitted diseases, prior negative relationships or other risks associated with developing an intimate relationship. Some women are unable to establish a relationship with another person, but still wish to be sexually active. These women often purchase sexual aids or devices so that they can achieve their personal sexual goals in this respect within the privacy of their homes without involving another person.

**3. Other vendors of sexual devices**

28. Until the adoption of section 13A-12-200.12 of the *Alabama Code*, the products sold by "Pleasures" and "Saucy Lady, Incorporated," were available for sale within in the State. Sex boutiques specializing in romance enhancing products and novelties operate in virtually every major city in Alabama and cities throughout the United States. Moreover, the products are available through mail order catalogues and the Internet.

**B. The User Plaintiffs**

**1. Betty Faye Haggermaker**

29. Plaintiff Betty Faye Haggermaker is a resident of the State of Alabama and a user of the types of devices which the new Alabama statute seeks to proscribe. Ms. Haggermaker is a 43 year-old married woman who uses the devices with her husband of twenty-five years, both to enhance their intimate relationship and to assist her in over-coming [*sic*] orgasmic difficulties. Ms. Haggermaker is a customer of "Saucy Lady, Incorporated."

30. During the second decade of Ms. Haggermaker's marriage, including the time period after she had a partial hysterectomy, it was very difficult for her to achieve orgasm. She has now used for approximately the last four years[,] and continues to use[,] marital aids to improve her intimate relationship with her husband and to achieve orgasm.

**2. Sherry Taylor-Williams**

31. Plaintiff Sherry Taylor-Williams is a resident of Alabama and a user of the types of devices which the new Alabama statute seeks to proscribe. Ms. Taylor-Williams is a 48 year-old woman who has been divorced and is now single. Ms. Taylor-Williams first began using sexual devices on the advice of her medical doctor after experiencing five years of

marital intimate relations without being able to achieve orgasm. Without such devices, Ms. Taylor-Williams is anorgasmic. Ms. Taylor-Williams is a customer of "Saucy Lady, Incorporated."

**3. Alice Jean Cope**

32. Plaintiff Alice Jean Cope is a resident of Alabama and a user of the types of devices which the new Alabama statute seeks to proscribe. Ms. Cope is a 30 year-old married woman who uses the devices in her intimate relations with her husband. The marital aids have been used as a door to open communication by Mrs. Cope and her husband. Before beginning use of such sexual devices approximately one year ago, Ms. Cope was anorgasmic for approximately the last ten years, even though she was sexually active during that time period. Ms. Cope is a customer of "Saucy Lady, Incorporated."

**4. Jane Doe**

33. Plaintiff Jane Doe is a resident of Alabama and a user of the types of devices which the new Alabama statute seeks to proscribe. Ms. Doe is a 50 year-old woman who is now single, but has previously been married and divorced. Ms. Doe began using sexual devices as a means to combat post-partum depression and to help her marital relationship. Her use of such devices was approved of and encouraged by her therapist. Using marital aids to reach orgasm improved Ms. Doe's marital relationship and helped her to overcome depression. Ms. Doe currently uses the devices to avoid the possibility of contracting sexually transmitted diseases. Ms. Doe is a customer of "Saucy Lady, Incorporated."

**C. Relevant Provisions of Alabama Law**

34. Pursuant to section 13A-12-200.2 of the *Alabama Code*, it is unlawful to sell or otherwise distribute obscene material. This has been the law in Alabama since at least 1975. In 1998, this provision of Alabama's criminal code was amended to prohibit the sale or distribution of any device designed or marketed primarily for the stimulation of human genital organs ("sexual aids," "sexual devices" or "marital aids"). The law went into effect on July 1, 1998. Enforcement of the ban will make it a crime to sell or distribute any device designed or marketed as primarily useful for the stimulation of human genital organs for any thing of pecuniary value. The only way to obtain marital aids will be to purchase or otherwise obtain them in another state and bring the product back across state lines. Alternatively, a visiting friend or other person can bring them across state lines and provide them to Alabama residents, provided a sale is not involved.

**D. Condoms, Virility Drugs, and Masturbation**

35. The text of the statute does not define sexual devices as obscene per se[,] or purport to regulate them on the grounds that they may be obscene as that term is defined in the statute. The statute simply declares that it is unlawful to sell, distribute[,] or produce any devices designed or marketed as primarily useful for the stimulation of human genital organs for any thing of pecuniary value. The legislative basis or rationale for the enactment of the prohibition against the sale of sexual devices does not appear in the statute or in the statement of legislative findings.[11]

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[11] The parties' stipulation notwithstanding, the court notes that the Alabama Legislature included its basis and rationale for Act No. 98-467 in section one of that Act. *See* Part II.D.1 *infra*.

36. Ribbed and tickler condoms are manufactured in Alabama and sold throughout the [S]tate as well as nationally.

37. Virility drugs, such as Viagra, are also available in Alabama.

38. The laws of the State of Alabama do not per se prosecute masturbation or other stimulation of the genitalia — even when performed with a sexual aid. It is only the sale of such devices that is proscribed. Note: This conduct may be unlawful if performed in conjunction with another illegal act, such as public lewdness, or molestation.

**E. Recognized Therapeutic Uses of the Proscribed Devices**

39. The plaintiff "sellers" of the products in this case have customers with a wide variety of therapeutic needs. A number of purchases are by anorgasmic women for which the use of a vibrator or similar device is the standard treatment recommended by therapists. Such a vibrator may or may not be penis shaped and may or may not be used for vaginal insertion. Because of the sensitive and intimately personal nature of the reasons for using the products, most users of the products are understandably reluctant to come forward and challenge this law.

40. Women who are anorgasmic have difficulty achieving orgasm through sexual intercourse, masturbation[,] or other stimulation of the genitalia. The inability to achieve orgasm through sexual intercourse is a recognized and treatable medical condition. In the opinion of some medical and psychological professionals, failure to treat the condition may not only jeopardize the women's physical and physiological health, but may also destroy a marriage or relationship. For this reason, many married and unmarried

couples seek out therapy or advice on how to treat this condition.

41. There are at least three reasons for use of a vibrator by anorgasmic women. First, some women may be less physiologically responsive than others. The vibrator is helpful for these women in the same manner as are the vibrators commonly used by physical therapists in the treatment of people with cerebral palsy. In treating cerebral palsy, the vibration has a specific effect on the sensory and motor enervation of the muscle. A vibrator is used in sex therapy to cause vibration to go through the pubic bone to the sensory endings called muscle spindles within the pelvic musculature. This helps lower the physiological threshold for initiating the spinal reflex.

42. The second reason for using a vibrator in dildo form is to lower a patient's inhibitions and produce intense stimulation that is difficult or impossible to duplicate manually. This is especially helpful to women who have built up a history of nonorgasmic sexual experiences, which causes what is called orgasmic inhibition.

43. Another reason for use of a vibrator in dildo form, or a dildo alone, is for women who have relaxed pelvic muscles which cause the orgasmic response to be less intense than usual. These women are prescribed Kegel's exercise, with a dildo or dildo-type vibrator inserted to provide resistance. This exercise is essential for women suffering urinary stress incontinence. Many women suffer varying degrees of incontinence at some point in their lives. The condition is often caused by the stretching of the pelvic ligaments during childbirth, which causes the bladder to prolapse. Kegel's exercise, in which the circumvaginal muscles are contracted and strengthened, is universally acknowledged as the most effective way of avoiding urinary stress incontinence, short of surgery.

**1. Federal Food and Drug Administration regulations**

44. The Food and Drug Administration has promulgated the following regulations concerning powered vaginal muscle stimulators and genital vibrators:

> § 884.[5940]. Powered vaginal muscle stimulator for therapeutic use.
>
> (a) Identification. A powered vaginal muscle stimulator is an electrically powered device designed to stimulate directly the muscles of the vagina with pulsating electrical current. This device is intended and labeled for therapeutic use in increasing muscular tone and strength in the treatment of sexual dysfunction. This generic type of device does not include devices used to treat urinary incontinence.
>
> (b) Classification. Class III (premarket approval).
>
> [....]
>
> § 884.5960. Genital vibrator for therapeutic use.
>
> (a) Identification. A genital vibrator for therapeutic use is an electrically operated device intended and labeled for therapeutic use in the treatment of sexual dysfunction or as an adjunct to Kegel's exercise (tightening of the muscles of the pelvic floor to increase muscle tone).

(b) Classification. Class II (performance standards).

21 C.F.R. §§ 884.[5940] & 884.5960 (1984)

45. Various studies estimate that 20% of all sexually active women have used a vibrator at some point during their lives. Therapists sometimes direct patients to adult stores to find suitable vibrators for therapy purposes. If vibrators and related products, such as oils and lubricant, were not readily available to the public, anorgasmic women who want to obtain such products would have to leave the [S]tate to do so or obtain them by other means.

46. Some of the plaintiff "users" of the products in this case are indeed anorgasmic and have purchased vibrators to treat their condition. Many customers of the plaintiff "sellers" in this case use sexual aids for these purposes as well. Some of these individuals have acted on the recommendation or approval of a therapist or medical doctor, while others may have acted on the recommendation of a husband, lover, friend, or popular literature freely available in the community.

47. A separate category of purchasers of the vibrators and other types of sexual devices covered by the challenged statutory provision are individuals for whom sexual intercourse may not be an option for a number of reasons, including a medical condition or physical handicap. Fear of contracting or spreading AIDS or another sexually transmitted disease is compelling grounds to avoid sexual intercourse, the availability of condoms notwithstanding. There are many individuals who would prefer to play it safe rather than risk their life with a one-night-stand. Many of the plaintiff "sellers'" customers fall into this category.

48. Sexual intercourse may not be an option for other reasons as well. An individual may be unable or simply unwilling to find a spouse or take on a serious or casual lover. This may be the result of an individual's physical appearance, personality, philosophy, or even the person's age, particularly if it is advanced. Thus, in addition to the women who use vibrators as a therapeutic device, a number of the individual plaintiffs in this case simply use vibrators and other devices as an alternative to sexual intercourse.

49. This decision is a matter of preference or may be the only viable way of obtaining sexual gratification because of the unavailability of a spouse or lover. Many of the plaintiff "sellers'" customers fall into this category.

50. One of the "user" plaintiffs in this case uses a vibrator or dildo-type device as an alternative to sexual intercourse for one or more of the reasons set out in the preceding paragraph.

**2. Booksellers, magazine publishers, gift shops, and Internet websites**

51. Barnes and Noble bookstore is located on University Drive in Huntsville, Alabama. Waldenbooks bookstore and Spencer Gifts shop are both located in Madison Square Mall in Huntsville. The Wal-Mart department store and Whispers, an adult novelty shop, are also located on University Drive. Except for Whispers, which restricts admittance to persons over 21 years of age, all of these stores are open to the general public.

52. Barnes and Noble sells a number of books which describe the use of vibrators/sexual aids to assist women in achieving orgasm and to help generally in sexual relationships. The following books are available at Barnes and Noble:

Becoming Orgasmic: A Sexual and Personal Growth Program for Women, Julia R. Heiman, Ph.D., and Joseph Lopiccolo, Ph.D., 1988, Prentice Hall Press[;]

The Complete Guide to Women's Health, 3rd Revised Edition, Bruce D. Shepard, M.D., F.A.C.O.G. and Carroll A. Shepard, R.N.[,] Ph.D., 1997, First Plume Printing[;]

Healthy Sex, Dr. Miriam Stoppard, 1998, DK Publishing Book[;]

The Kinsey Institute New Report on Sex: What You Must Know To Be Sexually Literate, June M. Reinisch, Ph.D.[,] with Ruth Beasley[,] M.L.S., 1990, St. Martin's Press[;]

The New Good Vibrations Guide to Sex, Cathy Winks and Anne Semans, 1997, Cleis Press Inc.[;]

Our Bodies, Ourselves for the New Century, 1998, Boston Women's Health Book Collective, 1998, Simon & Schuster[;]

Sex For One: The Joy of Selfloving, Betty Dodson, Ph.D., 1996, Three Rivers Plus[;]

Sex Over 40, Saul H. Rosenthal, M.D., 1987, Tarcher/Putnam[;]

Sexual Pleasure: Reaching New Heights of Sexual Arousal & Intimacy, Barbara Kessling, Ph.D., 1993, Hunter House, Inc.[;]

A Woman's Guide to Overcoming Sexual Fear & Pain, Aurelie Jones Goodwin, Ed.D.[,] and Marc E. Agronin, M.D., 1997, New Harbinger Publications, Inc.

Excerpts from the above titles are attached to the affidavit of Amy Louise Herring as Exhibit "A", submitted in support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Each of these books describe and recommend the use of vibrators as a sexual aid.

53. Waldenbooks also has a variety of titles which discuss vibrators and their use in achieving orgasm and enhancing sexual relationships. The following books are available at Waldenbooks:

Changing Positions: Women Speak Out On Sex And Desire, Joanne Marrow, Ph.D., 1997, Adams Media Corporation[;]

The Guide To Getting It On!: A New and Mostly Wonderful Book About Sex, Goofy Foot, 1996, The Goofy Foot Press[.]

Attached to the affidavit of Amy Herring as Exhibit "B" are excerpts from those books. Those books describe and recommend the use of vibrators as a sexual aid.

54. Spencer Gifts offers for sale a number of vibrators from a variety of available products. Copies of portions of the exterior packaging of three of these items are included as Exhibit "C" in the affidavit of Ms. Herring. The packaging of each of those items indicates that the items are intended to be used in sexual activities.

55. Two of the books available in Huntsville's bookstores, entitled Sex Over Forty and Becoming Orgasmic,

described a commonly sold body massager and how it could be used to stimulate the human genitalia. A device meeting this description is located in the personal appliance section of Wal-Mart on University Drive. A copy of a portion of the exterior packaging of this product is attached to the affidavit of Ms. Herring as Exhibit "D". Although nothing on the package suggests the use of the product for such stimulation, the instructions provided in Sex Over Forty and Becoming Orgasmic clearly indicate that this product may be used successfully for the stimulation of the human genital organs.

56. Numerous magazines available in Huntsville contain advertisements for sexual aids available by mail and/or articles about the use of sexual aids to achieve orgasm. The following magazines are sold locally:

> Complete Woman, June/ July 1998 (Obtained from B.J. Bailey on July 9, 1998)[;]
>
> Cosmopolitan, July 1998 (purchased at Barnes & Noble on July 9, 1998)[;]
>
> McCall's, April 1998 (purchased at Barnes & Noble on July 9, 1998)[;]
>
> Redbook, July 1998 (purchased at Barnes & Noble on July 9, 1998)[;]
>
> Scientific American Presents Women's Health, Quarterly, Display until August 31, 1998 (purchased at Barnes & Noble on July 9, 1998)[;]
>
> Sex Life, #4 (purchased at Barnes & Noble on July 9, 1998)[.]

Copies of ads and/or articles found therein are included as Exhibit "E" in the affidavit of Ms. Herring.

57. The Internet contains numerous web sites which featured the sale of sexual aids. The following sites are available:

"Action Girl Toys,"
http://www.girltoys.com[;]

"Acts of Love: Toys & Video,"
http://www.barelake.com/ cat2.html[;]

"Condoms, etc.,"
http://www.condomsetc.com[;]

"Good Vibrations - Toys,"
http://secure.goodvibes.com/cgi-bin/menu...
=PJFWPXSPZNFRSNCM&sub=toys&docs=
index.html[;]

"Kamma Sutra,"
http://www.pleasureplay.com/shop.html[;]

"Secret Toys,"
http://www.secrettoys.com/sextoys/menu.html[;]

"TOYBOX erotica,"
http://www.toyboxerotica.com/tbstlc.htm[.]

Excerpts from the sites are attached as Exhibit "F" in Ms. Herrings's affidavit.

**3. Alfred Jack Turner, Ph.D.**

58. Dr. Alfred Jack Turner is a clinical psychologist in private practice in Huntsville, Alabama and an expert in

the fields of clinical psychology and human sexuality. In the past, he has testified in that capacity. Dr. Turner is an expert for purposes of FRE 702 in the field of clinical psychology and the treatment of sexual disorders. The bases of his opinion and testimony comport with FRE 703. Dr. Turner has been in private practice since 1978. Before that, he was the Associate Director of the Huntsville-Madison County Mental Health Center from 1970 until 1978. Dr. Turner was a faculty member at Auburn University from 1964 until 1970, first as an Assistant Professor of Psychology (1964-1967) and later as an Associate Professor of Psychology (1967-1970); serving also as a member of the University of Alabama in Huntsville.

59. Dr. Turner was a consultant for the National Aeronautics and Space Administration ("NASA") in Huntsville from 1963 to 1975. He served as a member of the Alabama State Board of Examiners in Psychology from 1966 to 1972 and as a member of the Professional Advisory Board of the State (Alabama) Mental Health Association from 1967 to 1970. He was a consultant to the Alabama Mental Health Association (1963-1970), the OEO Programs in Lee and Macon Counties, Alabama (1966-1969), the Tuskegee Mental Health Clinic (1964-1969), the Veteran's Administration Hospital, Tuskegee, Alabama (1964-1969; also Coordinator of Group Therapy from March, 1966), and the Jackson County, Morgan County[,] and Tri-County Mental Health Clinics (1962-1964).

60. Dr. Turner received his Ph.D. in Psychology from Florida State University in 1962. He served an Internship in Clinical Psychology at the University of Louisville during 1961-1962. He received the Bachelor of Science Degree in Physical Education from Auburn University (1954). He also pursued post-graduate studies in psychology at Emory University (1956-1957) and Auburn University (1957-1958).

61. Dr. Turner holds professional memberships in the American Psychological Association, the Southeastern Psychological Association, the Alabama Psychological Association (President 1967-1968, Chairman, Committee for Training and Salary Standards for Psychologists in Alabama and Committee on Insurance), the American Association of University Professors, Phi Delta Kappa, Phi Chi, and the Association for the Advancement of the Behavioral Therapist. Dr. Turner's *vita* is attached hereto as an additional reference and also lists honors received and describes his dissertation and professional publications.

62. If called to testify, Dr. Turner would testify that in his practice in clinical psychology, he principally counsels patients who have experienced sexual dysfunction or other sexual problems. Many of his female patients have difficulty in achieving orgasm and, in some cases, have never achieved orgasm. Dr. Turner regularly recommends the use of sexual/marital aids such as vibrators to his patients to assist them in overcoming sexual dysfunction and other sexual problems. Reports from his female patients have indicated that sexual aids have helped them in achieving orgasm, sometimes after many years of frustration and difficulty in their sexual relationships.

63. If called to testify, Dr. Turner would testify that he also sometimes counsels older persons or disabled persons who are having difficulties with sexual expression. The use of sexual aids such as vibrators is also extremely helpful in these situations, especially when sexual intercourse is not possible due to physical limitations or lack of a partner.

64. If called to testify, Dr. Turner would testify that other situations in which he has recommended the use of sexual aids to aid in overcoming sexual difficulties have included persons who are not able to have a sexual partner due to fear of sexually transmitted diseases, emotional

attachment[,] or other perceived dangers of sexual relationships, both real and imagined. He has counseled some patients who were unable to locate appropriate sex partners due to lack of physical attractiveness or obesity. Sexual aids have provided an appropriate outlet for sexual expression for these patients as well.

65. It is Dr. Turner's professional opinion[,] based on his years of experience in sexual therapy and counseling, [that the] expression of sexuality, including the successful experience of orgasm, are important aspects of a person's overall mental health. His professional opinion is that the sexual experience[,] culminating in sexual climax or orgasm[,] builds self-esteem and confidence, relieves stress[,] and has been clinically proven to generate and release hormones which aid in the achievement of an appropriate mental balance and positive outlook on life situations in general. In his practice, he has frequently seen sexual aids help in the re-vitalization of potentially failing marital relations as well.

**4. Pepper Schwartz, Ph.D.**

66. Dr. Pepper Schwartz is a Professor of Sociology at the University of Washington Department of Sociology in Seattle, Washington, where she has done research and taught classes since 1972. She is a nationally renowned expert in the field of human sexuality and has also testified on the subject on numerous occasions. Dr. Schwartz is an expert for purposes of FRE 702 in the field of human sexuality. The bases of her opinion comports with FRE 703.

67. Dr. Schwartz's teaching has included courses on the contemporary family, the history of the family, gender and the family, gender and sexuality, the social organization of human sexuality, qualitative methodology[,] and other topics. At this university, Dr. Schwartz has also served on

the executive, recruitment, admissions, and development committees of her department[,] and took a leave of absence to be a Special Assistant to the Provost for two years.

68. Dr. Schwartz received her Ph.D. from Yale University in 1974. She received a M.Phil. from that University in 1970, a M.A. from Washington University (in St. Louis) in 1968[,] and a B.A. from Washington University in 1967.

69. Dr. Schwartz was elected President of the Society for the Scientific Study of Sex, an international association of sex researchers, in 1992-93[,] after having served as President of the Western region of that organization in 1989-91. Among other national offices and services[] Dr. Schwartz has performed, she was elected to the Committee of Publications for the American Sociological Association 1995-98, appointed to the American Medical Association review committee on Human Papilloma Virus Consensus Group in 1997[,] and the Yale Council Committee on the Social Sciences 1989-1993.

70. Dr. Schwartz is on the editorial board of a number of sociological and sexological publications[,] including the Journal of the International Network on Personal Relations, Sexual Health[] (senior editor), and the Journal of Personal Relationships. She has served as a reviewer for many other journals[,] including the American Sociological Review, the Journal of Marriage and the Family, the Journal of Family Issues, etc. She has also served on several review committees for the National Institute of Health.

71. Dr. Schwartz has been asked to give expert testimony on a number of important issues in her field and has served on national commissions. She was asked to give testimony in *Baehr v. Department of Health*, 1st Circuit

Court of Hawaii, on the issue of gay marriage and marriage in the United States, and on sexuality in the military in Federal Court in New York City in the 2nd Circuit on the comparisons of heterosexual and homosexual practices. She has also given testimony to the United States Commission on AIDS. Dr. Schwartz served on the National Committee on Sexual Education for Planned Parenthood, the National Committee on Sexuality and the Media for S.E.I.C.U.S.[] (sex education, information council of the United States)[,] and for the National Commission on Adolescent Sexual Health. In 1984, Dr. Schwartz served on President Ronald Reagan's Advisory Roundtable on the Family.

72. Dr. Schwartz is the author of eleven books, most of a scholarly nature, among them The Gender of Sexuality (with Virginia Rutter) Pine Forge, 1998, Peer Marriage, Free Press, 1994, Gender and Intimate Relationships (with Barbara Risman and others) and American Couples (Wm. Morrow, 1983). She also writes for a general audience and writes nationally syndicated columns for American Baby Magazine on relationships and sexuality and Glamour Magazine (with Janet Lever) on Sex and Health. She has also written The Great Sex Weekend (with Janet Lever; Putnam, 1998) which, among other information, discusses the use of vibrators in sexual enhancement. The newest popular books Dr. Schwartz has written will be published next year, What I Learned about Sex; Wisdom from America's Sex Educators, Counselors, and Researchers (with Debra Hafner; Putnam, 1998) and 201 Questions for Parents to ask Children/ 201 Questions for Children to ask Parents, Avon, 1999. Dr. Schwartz has also published over 40 academic articles. More specific information is included in her vita.

73. If called to testify, Dr. Schwartz would testify that based on her review of the literature, her interviews with hundreds of couples about their sex lives, and her receipt of

thousands of questionnaires and letters from both men and women, she has concluded that vibrators are a commonly accepted form of sexual pleasure, release and therapy in the United States, most usually used in couple relationships, but also used by women and men alone.

74. If called to testify, Dr. Schwartz would testify that her research and experience indicates that some of the earliest discussions of vibrators and dilators (often popularly called dildos) appears in the therapeutic literature in the early work of William Masters and Virginia Johnson in which they used both devices to measure female sexual functioning. The work they did would have been impossible to accomplish without these devices and they helped establish base line data on orgasmic capacity and dysfunction. Later work by Masters, Johnson[,] and Kolodny helped establish that vibrators and dilators were useful for helping establish orgasmic capacity in anorgasmic women and also for re-establishing capacity in gerontological populations. They also did some work in helping women who had little or no sexual feeling establish sexual feeling.

75. If called to testify, Dr. Schwartz would testify that her research and experience indicates that the field of modern sex therapy was essentially established with the work of Masters, Johnson, and Kolodny, although sexual therapy per se has been practiced for hundreds of years and there is advice on how to be sexually functional in the most ancient of tracts. This is because, throughout the ages, people have realized that sexual functioning is an important part of human mental health -- not just for the purposes of reproduction, but also for promoting health, happiness, and relationship bonding.

76. If called to testify, Dr. Schwartz would testify that her research and experience also indicates that modern sexual therapy now believes that masturbation is an

important adjunct to sexual functioning[,] and that masturbation is a healthy rehearsal to establish knowledge about one's body and the ability to give and receive pleasure. While it might seem that everyone could accomplish masturbation manually, in fact, some women do not masturbate competently, this is sometimes because of misinformation, and other times because there may be problems with blood flow into the vaginal area.

77. If called to testify, Dr. Schwartz would testify that her research and experience indicates that vibrators produce an intense stimulation that creates more blood flow, more quickly for some women[,] and thus is recommended by therapists as a way for creating enough sexual arousal for women who are having trouble increasing arousal enough to have an orgasm, or even to enjoy sexual intercourse. This is therapy for couples who are having sexual problems in their marriage, but also for women without partners who want to be able to experience sexual arousal and satisfaction. This also includes older women who may be widowed and would like to stay sexually active[,] even if they do not have a partner[,] and the disabled[,] who may never have a partner[,] or who, because of their disability, did not have the usual gradual sexual socialization and haven't learned how to make their body work for them and need assistance.

78. If called to testify, Dr. Schwartz would testify that her research and experience indicates that sex therapy has grown because so many people now value a high level of sexual functioning. Still, there are very few places that doctors and psychologists can send their patients to buy sexual devices. There are some mail order catalogues[,] but doctors do not always know about them[,] and individuals seeking this information may not know about them either. In Dr. Schwartz's professional opinion, small stores specializing in these devices are absolutely necessary so that individuals can find the vibrators and dilators that will help them be

functional. Furthermore, there are different size dilators and different power vibrators[,] and it helps to be able to look at them and find what is required. In circumstances of severe dilation problems, for example, the physician might start with very little intromission (entry with a small finger, for example) and then, upon increasing the elasticity of the vagina, use dilators of increasing size.

79. Dr. Schwartz's research and experience also indicates that[,] while the most problematic of sexual problems may be relatively rare (having to dilate an almost closed vaginal canal), there are numerous other reasons for using a vibrator. These include: (1) learning how to have an orgasm; (2) satisfying one's desires before one is ready for a partner; (3) use by the pathologically shy; (4) use by people with grave physical and mental afflictions, etc.; (5) use after divorce; (6) use in old age; or (7) use when one's partner is unavailable. One prominent study relied upon by Dr. Schwartz stipulates that approximately 20% of American women at least occasionally use a vibrator. The National Sexual Health Study by Julia Heiman (University of Washington) and Joseph Catania (UCLA) done in 1997 indicated about 10% of sexually active adults use vibrators in their regular sex life.

80. Dr. Schwartz's research and experience indicates that almost every book on sexual therapy supports the use of vibrators and dilators as an important way to teach sexual functioning. Anecdotal information from case studies of women in these books confirms the utility of these sex devices. The Harvard Women's Medical book talks about using dilators for Kegel's exercises (strengthening the pelvic muscles to make orgasm more likely or more intense or to help reverse stress incontinence—a common problem in post-menopausal women). An article by Clive Davis, et al., in the Journal of Sex Research in 1996, "Characteristics of Vibrator Use Among Women," shows that in a sample of women who

have bought vibrators at one store, that these women use them in partnered relationships, but most commonly alone. Women tended to rate orgasms as more intense with vibrators than in intercourse (see also Lonnie Barbach, For Yourself)[,] but that is seen as an adjunct to partner relationships, not a replacement.

81. Dr. Schwartz's research and experience also indicates that several articles ("Help with Sexual Difficulties", "Drug Therapy Bulletin", "The relationship between mode of female masturbation and achievement of orgasm in coitus", Archives of Sexual Behavior, June 1983, and others to be produced), establish that vibrators helped anorgasmic women, especially disabled women, reach orgasmic potential. Even articles that say vibrators are less effective than previously thought, find vibrators helping produce orgasmic capacity at 47% of the treatment group. ("The semantics of success: do masturbation exercises lead to partner orgasm?" J.C. Wakefield, Journal of Sexual and Marital Therapy, Spring 1987.)

82. In the professional opinion of Dr. Schwartz vibrators and dilators are of medical and psychological benefit to women and their partners, an adjunct to marital and sexual therapy and an absolute necessity in some kinds of therapeutic approaches for sexual dysfunction.

(Stipulation of facts, Doc. No. 33.)

## II. ANALYSIS OF THE PARTIES' CONTENTIONS

### A. Standing to Sue

The federal concept of "standing" addresses the issue of whether a particular person is the proper party to mount a constitutional challenge to governmental action. *See generally*, Charles Allen Wright, *Law of Federal Courts* § 13

(5th ed. 1994); Erwin Chemerinsky, *Federal Jurisdiction* 53 (2d ed. 1994). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Supreme Court has articulated the standing requirement as part of the "case or controversy" requirement of Article III, Section 2 of the United States Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The doctrine of standing mandates that a party seeking to invoke a federal court's jurisdiction demonstrate three things: (1) an "injury in fact"; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *See Northeastern Florida Contractor v. Jacksonville*, 508 U.S. 656, 663, 113 S.Ct. 2297, 2302, 124 L.Ed.2d 586 (1993).

The Attorney General challenges the vendor plaintiffs' ability to assert a challenge to Alabama Act No. 98-467 on behalf of their customers: that is, of unnamed users of the proscribed devices. Clarifying this position at oral argument, the Assistant Attorney General representing defendant said: "[w]e think the sellers can have standing as sellers of the products but not on behalf of the users, ... given the fact that users are here" (emphasis supplied).

As an initial matter, this court finds that the vendor plaintiffs independently satisfy standing requirements. *See Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976). Furthermore, this court agrees with the Attorney General's implicit concession that the user plaintiffs have standing to assert a due process challenge. *Cf. Carey v. Population Services International*, 431 U.S. 678, 683-84, 97 S.Ct. 2010, 2015, 52 L.Ed.2d 675 (1977). As a consequence, it is not necessary to decide the standing of the vendor plaintiffs to act as advocates for the rights of

unnamed users of the proscribed devices.[12] *See id.* at 682, 97 S.Ct. at 2014. The Article III "case or controversy" requirement has been satisfied for the challenges to the legislation presented in this action.

## B. Framework of Analysis for Substantive Due Process Claims

Plaintiffs claim enforcement of Alabama Code § 13A-12-200.2(a)(1)[13] would impose an undue burden on their "fundamental rights of privacy and personal autonomy guaranteed by the First, Fourth, Fifth, Ninth[,] and Fourteenth Amendments of the United States Constitution." (Plaintiffs' corrected memorandum, Doc. No. 24, at 2.) Plaintiffs thus assert that their right of privacy and personal autonomy constitutes a "liberty interest" protected by the Due Process Clause of the Fourteenth Amendment. Such claims fall under the rubric and correlative analytical

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[12] Generally, a plaintiff must assert his, her, or its own legal rights and interests. The Supreme Court has recognized exceptions to this general rule, however, including one in which third parties have not and are not likely to assert their rights and interests which are at stake. The vendor plaintiffs in the instant case presumably rely upon this exception, and likely could avail themselves of this exception in the absence of the user plaintiffs. "[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig*, 429 U.S. at 195, 97 S.Ct. at 456.

[13] The text of section 13A-12-200.2(a)(1) is set out on p. 3 *supra*. Subsections (a)(2) and (a)(3) of the same statute also were amended by section six of Act No. 98-467. Subsection 200.2(a)(2) applies the prohibition articulated in (a)(1) to wholesalers. Subsection 200.2(a)(3) now makes it "unlawful for any person to knowingly produce, or offer or agree to produce" such material or devices. (Emphasis supplied.) Although these other subsections contain prohibitions similar to the ones contained in section 13A-12-200.2(a)(1), and likely would be subject to a similar analysis, only subsection (a)(1) is attacked in the instant case.

framework of substantive due process claims. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, ___, 117 S.Ct. 2258, 2267-68, 138 L.Ed.2d 772 (1997).

The standard of scrutiny a legislative act faces when challenged on such grounds depends upon whether the statute burdens a "fundamental right." If legislation interferes with the exercise of a fundamental right, then that legislation is subject to strict judicial scrutiny. The ensuing inquiry asks whether the challenged governmental action is justified by a compelling state interest, and whether the statute at issue is narrowly tailored to achieve that compelling state interest through the least restrictive means possible. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' ... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

If legislation does not burden a fundamental right, however, then the act faces only minimal scrutiny: that is, a "rational basis" standard. When reviewing legislation under a rational basis test, courts ensure only that a legitimate governmental interest supports the legislation, and, that the resulting law bears a rational relation to that interest. *See Glucksberg*, 117 S.Ct. at 2271; *Reno v. Flores*, 507 U.S. 292, 302-05, 113 S.Ct. 1439, 1447-49, 123 L.Ed.2d 1 (1993).

Thus, determining whether a particular statute interferes with the exercise of a fundamental right is a critical inquiry in the analysis of substantive due process claims.

### C. Does the Alabama Act Infringe on a Fundamental Right?

Plaintiffs do not seek recognition of a fundamental right. Rather, they seek extension of the "right to privacy"

which the Supreme Court has recognized as fundamental in certain contexts.

Plaintiffs frame the issue in this case as whether the right to privacy "is broad enough to encompass an individual's decision to engage in private sexual activity not proscribed by law." (Plaintiffs' corrected memorandum, at 14 (emphasis in original).)

The Attorney General, on the other hand, contends this case presents the following question: "whether there is a constitutional right to obtain dildos, vibrators, and other marital aids 'designed or marketed as useful primarily for the stimulation of human genital organs.'" (Brief of Alabama Attorney General, Doc. No. 35, at 4.)

In the opinion of this court, however, the issue at this stage of analysis is neither as broad as plaintiffs suggest, nor as narrow as the Attorney General defines it. Instead, this court must decide whether the concept of a constitutionally protected "right to privacy" protects an individual's liberty to use devices "designed or marketed as useful primarily for the stimulation of human genital organs" when engaging in lawful, private, sexual activity.[14]

**1. Background: fundamental rights generally**

The Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects individuals from state governmental interference with specific liberty interests, not simply from physical restraint. In so doing, the Court speaks in terms of "substantive due process" and "fundamental rights." The Court also consistently expresses or manifests its reluctance to expand these notions and, therefore, the protection of the Due Process Clause:

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[14] For a complete discussion of how this court frames the issue presented by plaintiffs' proposed extension of the fundamental right to privacy, see Part II.C.5, *infra*.

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> [W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S., at 125, 112 S.Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court. *Moore*, 431 U.S., at 502, 97 S.Ct., at 1937 (plurality opinion).

*Glucksberg*, 117 S.Ct. at 2267-68.

These concerns have prompted the Court to maintain focus on its proper role when reviewing legislative enactments. Accordingly, the Court adheres to an analytical method with two principal guidelines: (1) "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," *id.* at 2268 (citations and internal quotation marks omitted); and (2) substantive due process claims require "a careful description of the asserted fundamental liberty interest. ...", *id.* (citations and internal quotation marks omitted). In accordance with these amorphous guidelines, the Supreme Court looks to the history, legal traditions, and practices of this Nation as "guideposts for responsible decisionmaking, ... that direct

and restrain [the Court's] exposition of the Due Process Clause." *Id.*

Recently, in *Washington v. Glucksberg*, 521 U.S. 702, ___, 117 S.Ct. 2258, 2267-68, 138 L.Ed.2d 772 (1997), the Court catalogued the opinions in which it had invalidated state laws because they infringed on an individual's fundamental rights.

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, [*Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)]. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278- 279, 110

S.Ct. 2841, 2851-2852, 111 L.Ed.2d 224 (1990)].

(Emphasis supplied.) This exhaustive list comprises only eight, specific liberty interests or fundamental rights.[15]

**2. Plaintiffs' assertion of a fundamental right**

As previously noted, plaintiffs seek extension of the recognized right to privacy, so that it covers individuals who desire to engage in lawful, private, sexual conduct that section 13A-12-200.2(a)(1) unduly burdens. Plaintiffs seek protection behind that line of cases guarding "the personal intimacies of the home, the family, marriage, motherhood, procreation, child rearing." *Paris Adult Theatre I v. Slaton*, 431 U.S. 49, 65-66, 93 S.Ct. 2628, 2639-40, 37 L.Ed.2d 446 (1973) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 92 S.Ct. 1029, 1038-1039, 31 L.Ed.2d 349 (1972); *id.* at 460, 463-65, 92 S.Ct. at 1042, 1043-044 (White, J., concurring); *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).)

Initially, plaintiffs divide the fundamental right jurisprudence into cases providing protection for "spatial"

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[15] The Court did not add to this total in *Glucksberg*, *see* 117 S.Ct. at 2271, nor has it done so since.

interests,[16] as distinguished from those according protection to "decisional" interests.[17] (Plaintiffs' corrected memorandum, at 15.) Plaintiffs then steer their argument onto the side of the dichotomy protecting "decisional" interests: "[This case] is more appropriately analyzed as involving encroachment upon the ultimate personal autonomy of individuals to make independent decisions about intimate matters for themselves." (*Id.*)

Plaintiffs also attempt to define the admittedly evasive contours of the right to privacy by dividing the relevant case law into three classes:

> (1) the right of marital privacy which extends to the physical and emotional intimacies between husbands and wives, *see, e.g., Loving v. Virginia, supra*; *Griswold v. Connecticut, supra*; (2) the right of family/ home privacy which encompasses not only decisions concerning raising children but also choices concerning family living arrangements, *see, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters, supra*; *cf. Stanley v. Georgia, supra* ...; and (3) the right of individual privacy which encompasses decisions concerning the integrity and autonomy of one's body, *see, e.g., Carey v. Population Services International, supra*; *Planned Parenthood of*

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[16] Plaintiffs cite as an example *Stanley v. Georgia*, 394 U.S. 557, 559, 89 S.Ct. 1243, 1245, 22 L.Ed.2d 542 (1969), in which the Supreme Court held that a person's "mere private possession of obscene matter [in the confines of his or her home] cannot constitutionally be made a crime." For a discussion of *Stanley*, see note 30 *infra*.

[17] Plaintiffs cite *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973).

> *Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, *supra*; *Skinner v. Oklahoma*, *supra*.

(Plaintiffs' corrected memorandum, at 15-16.) Plaintiffs claim the "central teaching" of the cases cited for the respective classifications is that "the right of privacy is broad enough to encompass matters of sexual intimacy." (*Id.* at 16.) Plaintiffs then conclude, by also invoking the holdings of those cases addressing abortion and contraception,[18] that the decision whether to engage in lawful, private, sexual activity garners the utmost constitutional protection.

The basic premise undergirding this argument is that protection for decisions concerning abortion and the use of contraceptives presupposes protection for the decision to engage in sexual activity in the first instance. Or, as plaintiffs phrase it: "That the Constitution provides the freedom to make the second decision necessarily means that the right to make the first one is protected." (*Id.*) Indeed, one could factually assert that the "decision whether to bear or beget a child," *Eisenstadt*, 405 U.S. at 453, 92 S.Ct. at 1038 (emphasis supplied), necessarily presupposes the right of two consenting, heterosexual partners to engage in the act of sexual intercourse.

**3. The Attorney General's response**

The Attorney General answers plaintiffs primarily by attempting to distinguish this controversy from those cases in which the Supreme Court has recognized a protected liberty interest under substantive due process analysis. For example, he first directs this court's attention to what the challenged Alabama statute actually prohibits and, more importantly, what it does not prohibit. In essence, section 13A-12-

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[18] *See, e.g.*, *Carey*, 431 U.S. 678, 97 S.Ct. 2010.

200.2(a)(1) bans the sale of sexual devices; it does not ban the possession or use of them. This is a significant distinction from *Griswold*, where the Court declared that, even though the Connecticut statute at issue there[19] sought to regulate conduct within the State's domain, it did so "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 381 U.S. at 485, 85 S.Ct. at 1682 (emphasis supplied). The Court recognized the right to marital privacy,[20] and then identified the impermissibly "broad sweep" of the law at issue: "[I]n forbidding the use of contraceptives rather than regulating their manufacture or sale, [the law] seeks to achieve its goals by means having the maximum destructive impact upon [the marital] relationship."[21] *Id.*, 85 S.Ct. at 1682 (emphasis

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[19] In *Griswold*, the Court considered the constitutionality of a Connecticut statute that barred the use or sale of "any drug, medicinal article or instrument for the purpose of preventing conception." 381 U.S. at 482, 85 S.Ct. at 1680.

[20] The *Griswold* Court held that:

> [T]he right of privacy which presses for recognition here is a legitimate one.
>
> The present case ... concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." ...

381 U.S. at 485, 85 S.Ct. at 1682.

[21] In a subsequent decision, *Carey v. Population Services International*, 431 U.S. 678, 687, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 675

supplied). The Attorney General carries this distinction to the next level,[22] thereby rendering moot this stated concern of the *Griswold* Court: "Would we allow the police to search the sacred precincts of marital bedrooms ...?" *Id.*, 85 S.Ct. at 1682.

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(1977), the Supreme Court placed this focus of the *Griswold* Court in a different light, one more translucent:

> *Griswold* did state that by "forbidding the use of contraceptives rather than regulating their manufacture or sale," the Connecticut statute there had "a maximum destructive impact" on privacy rights. 381 U.S., at 485, 85 S.Ct., at 1682. This intrusion into "the sacred precincts of marital bedrooms" made that statute particularly "repulsive." *Id.*, at 485-486, 85 S.Ct., at 1682. But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. *Eisenstadt v. Baird*, holding that the protection is not limited to married couples, characterized the protected right as the "decision whether to bear or beget a child." 405 U.S., at 453, 92 S.Ct., at 1038 (emphasis added). Similarly, *Roe v. Wade*, held that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S., at 153, 93 S.Ct., at 727 (emphasis added). *See also Whalen v. Roe*, *supra*, 429 U.S., at 599-600, 97 S.Ct., at 876-877, and n.26. These decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

[22] "Prohibiting sales of sexual devices does not require the State to intrude into the bedrooms of its citizens to investigate suspected violations as would a prohibition on their use." (Brief of Alabama Attorney General, at 7.)

The Attorney General offers a second distinction from the cases relied upon by plaintiffs. He argues that application of those cases to the instant controversy requires an unprecedented and unwarranted leap in logic. He contends the liberty interests recognized in those cases are limited to "marriage, procreation, contraception and abortion." (Brief of Alabama Attorney General, at 8.) The Attorney General quotes the discussion of *Griswold* in another such case, *Carey v. Population Services International*, 431 U.S. 678, 687, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 675 (1977): "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." (Brief of Alabama Attorney General, at 8 (emphasis in original).)

Bolstering his argument that no fundamental right protection is warranted in this case, the Attorney General invokes the *Glucksberg* Court's description of fundamental rights: "Plaintiffs cannot be possibly suggesting that the use, let alone the purchase, of sexual devices for the purposes of achieving orgasms is 'so deeply rooted in our history and traditions, or so fundamental to our concept of ordered liberty,' ... that it is protected by the Constitution." (*Id.* (citation omitted).) The Attorney General also exposes any theory that the decision to use these devices deserves protection, because the decision implicates an individual's personal autonomy, or because the devices are used behind closed doors, to the light of *Glucksberg*: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." (*Id.* at 9) (quoting *Glucksberg*, 117 S.Ct. at 2271).

The Attorney General offers these distinctions in support of his effort to narrow the issue before the court: "[T]his case is not about the right to control one's own reproductive organs and make decisions regarding whether

or not to have children and raise a family. This case is about the 'right' to purchase a product to use in pursuit of having an orgasm." (Brief of Alabama Attorney General, at 7.)

Ultimately, the Attorney General contends "[t]his case presents the question whether there is a constitutional right to obtain dildos, vibrators, and other marital aids 'designed or marketed as useful primarily for the stimulation of human genital organs.'" (Brief of Alabama Attorney General, at 4.) He asserts that no fundamental right to acquire or sell such sexual devices exists. The Attorney General, therefore, concludes that this case should not be subjected to "strict scrutiny."

**4. Decisions of other courts faced with this issue**

In addition to Alabama, seven states have enacted laws banning the sale, distribution, or "promotion" of sexual devices.[23] The statutes in several of these states have been challenged on numerous grounds. State courts in Colorado,[24] Kansas,[25] and Texas[26] have addressed claims that the respective statutes violated the fundamental right to privacy.

The Colorado Supreme Court and the Kansas Supreme Court each sustained the challenge, holding that the sweep of the respective statute was excessively broad and unduly burdensome to the fundamental right to privacy.

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[23] These seven states are Colorado, *see* Colo. Rev. Stat. § 18-7-101, 102, Georgia, *see* Ga. Code Ann. § 16-12-80, Kansas, *see* Kan. St. Ann. § 21-4301, Louisiana, *see* La. Rev. Stat. Ann. § 14:1206.1, Mississippi, *see* Miss. Code Ann. § 97-29-105, Texas, *see* Tex. Penal Code Ann. § 43.21, 43.23, and Virginia, *see* Va. Code Ann. § 18.2-373.

[24] *See* Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).

[25] *See* State v. Hughes, 792 P.2d 1023 (Kan. 1990).

[26] *See, e.g.*, Regaldo v. State of Texas, 872 S.W.2d 7 (Tex. Crim. App. 1994); Yorko v. State of Texas, 690 S.W.2d 260 (Tex. Crim. App. 1985).

Each court relied heavily on the fact that the proscribed devices are used as a means of treatment for certain physical and psychological disorders: that is, there are "legitimate medical [and] therapeutic use[s] of such devices." *Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985).

Texas courts, on the other hand, rejected similar challenges. In *Yorko v. State of Texas*, 690 S.W.2d 260 (Tex. Crim. App. 1985), the court drew a distinction between contraceptives, which are protected, and obscene material, which is not. Focusing on the uses of sexual devices such as those at issue here, the *Yorko* court found the devices were more like obscene material than condoms and, therefore, were not protected. The court in *Regaldo v. State of Texas*, 872 S.W.2d 7 (Tex. Crim. App. 1994), flatly rejected the plaintiff's challenge. The court cited a footnote from *Carey*, where the Supreme Court said it had never held that a fundamental right to sexual privacy exists under the Constitution.[27] The *Regaldo* court also cited state court precedent rejecting this fundamental right argument, and concluded "[t]here is no fundamental right to use obscene devices; therefore, restricting the promotion of such devices does not infringe on any recognized fundamental right." *Id.* at 9.

Aside from the state courts addressing challenges similar to the assault mounted upon the Alabama Act in this case, the former Fifth Circuit and the Supreme Court have seen challenges to legislation that is similar to the Alabama statute at issue here. The Fifth Circuit upheld the Texas

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[27] The cited *Carey* footnote, number 17, reads in pertinent part as follows: "We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults." 431 U.S. at 695 n.17, 97 S.Ct. at 2021 n.17. *See Regaldo*, 872 S.W.2d at 9.

statute[28] in *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. June 1981).[29] The court defined plaintiffs' numerous challenges as follows:

> Plaintiffs attack the challenged statutes from several angles. They maintain that some provisions are unconstitutionally vague or overbroad or both. They complain that certain provisions threaten those charged under the statute with denials of procedural due process and that other provisions infringe upon fundamental rights of expression and personal autonomy. They assert that the statute, by outlawing the sale or possession in quantity of sexually stimulative materials and devices, denies equal protection of the laws to handicapped persons dependent on these items for sexual gratification.

648 F.2d at 1025-26. Rejecting these challenges, the court focused primarily on the First Amendment claim and turned to the Supreme Court's obscenity jurisprudence. The court's only other mention of the fundamental right issue came in its brief discussion of the equal protection claim: "With nothing more than the naked legal conclusions on the record, we have no evidentiary basis to sustain the plaintiffs' proposed extension of the constitutional guarantee of personal autonomy." 648 F.2d at 1028 (citing *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973)). The Supreme Court denied plaintiff's petition for writ of

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[28] For the text of the Texas statute, see *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1025 n.1 (5th Cir. 1981).

[29] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

certiorari. *See Theatres West, Inc. v. Holmes*, 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982).

The Supreme Court also dismissed an appeal from the Supreme Court of Georgia in *Sewell v. Georgia*, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). The appeal challenged the Georgia Supreme Court's affirmance of appellant's conviction for selling material and devices prohibited under that State's obscenity statute. The constitutional challenges raised by the appellant in *Sewell* were summarized by Justice Brennan in his dissent from the Court's dismissal of the appeal as follows:

> First, he argues that an obscenity statute which defines scienter in a manner which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of materials protected under the First and Fourteenth Amendments. ... Second, he argues that there is no rational basis for § 26-2101(c) and, in addition, that it is unconstitutionally vague. ... Third, appellant contends that "Hot and Sultry" is not obscene as a matter of law. ... And, finally, appellant challenges the warrantless mass seizure of the sexual devices on First, Fourth, and Fourteenth Amendment grounds.

435 U.S. 982, 984, 98 S.Ct. 1635, 1636 (Brennan, J., with whom Marshall, J. joins, dissenting) (internal citations omitted). The appeal was dismissed nevertheless, over the dissents of Justices Brennan, Marshall, and Stewart, "for want of a substantial federal question." *Id.* at 982, 98 S.Ct. at 1635.

This court finds the decisions discussed above informative, but neither binding nor particularly persuasive, because each case can be distinguished by differences in the

statute at issue, or in the challenges to the statute which the plaintiffs pursued (or the respective courts chose to address).

**5. Breadth of the fundamental right to privacy**

As a preliminary matter, this court now will confront the primary distinction underlying the different manners in which the parties frame the issue raised by this case.

Each party makes much ado about the distinction between the sale, distribution, or marketing of sexual devices, and the use or simple possession of such devices. The court finds that the arguments to this end are specious, at least in so far as they are intended to bear upon the fundamental right determination. In fact, answering whether such a distinction is meaningful with regard to a particular prohibition begs the question of what protection the proscribed material or conduct deserves.[30] Nevertheless, to

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[30] In *Stanley v. Georgia*, 394 U.S. 557, 559, 89 S.Ct. 1243, 1245, 22 L.Ed.2d 542 (1969), the Supreme Court held that "mere private possession of obscene matter cannot constitutionally be made a crime." The Court distinguished its earlier decision in *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957), because *Roth* and its progeny did not involve prosecution for private possession of obscene material. The *Stanley* Court concluded that the First and Fourteenth Amendments prohibit making mere possession of obscene material a crime. *Stanley*, 394 U.S. at 568, 89 S.Ct. at 1249-50.

The Supreme Court soon would limit the holding of *Stanley*, however, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). There, the Court refused to extend the right to possess obscene material to the right to distribute obscene material. The Court reiterated this holding in *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), a case the Court decided on the same day it handed down its opinion in *Thirty-Seven Photographs*. The *Reidel* Court opined that the right to possess obscene material expressed in *Stanley* "does not require that we fashion or recognize a constitutional right ... to distribute or sell obscene material." *Id.* at 356, 91 S.Ct. at 1412. The Supreme Court again determined that the right to possess obscene material in the privacy of one's home does not "give rise to a correlative right to have someone sell or give it to

resolve the issues raised by plaintiffs' assertion of a "fundamental right," this court must focus on the use of the proscribed devices, rather than their distribution because, if the use of such devices is a fundamental liberty interest as plaintiffs contend, then the legislature's ban on distribution compels strict judicial scrutiny.

The Supreme Court has clearly said that it has not yet decided whether lawful, private, sexual conduct is sheltered from state interference by the Constitution. For example, in

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others" in *United States v. 12,200 Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128, 93 S.Ct. 2665, 2669, 37 L.Ed.2d 500 (1973), and *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973).

The distinction in treatment of the possession *versus* the sale of obscene material (which is unprotected) stands in contrast to the treatment of such distinction where the statute burdens liberties protected by the fundamental right to privacy. The opinions in two cases elucidate the fact that any significance of the distinction between prohibitions of commercial use versus private use depends on the protection the Constitution affords the targeted material or conduct. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66, 93 S.Ct. 2628, 2640, 37 L.Ed.2d 446 (1973), the Court alluded to this fact: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" The Court solidified the validity of this distinction in *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), holding:

> Restrictions on the distribution of contraceptives clearly burden the freedom to make [protected childbearing] decisions. ... The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. This is so ... because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing ....

*Carey* the Court noted that it "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults, ... and we do not purport to answer that question now." 431 U.S. at 689 n.5, 97 S.Ct. at 2018 n.5; *see also Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 n.6 (8th Cir. 1981). *But see Carey*, 431 U.S. at 718 n.2, 97 S.Ct. at 2033 n.2 (Rehnquist, J., dissenting) ("While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established.") (citing *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975)). Consequently, as plaintiffs conceded at oral argument, they must seek an extension of the line of cases establishing that fundamental decisions inherent in an individual's personal autonomy are protected by the Due Process Clause of the Fourteenth Amendment, because no case has recognized that the Due Process Clause protects their asserted liberty interest. *See Vance*, 648 F.2d at 1028.

To be sure, several opinions discuss principles which support plaintiffs' desired extension of the fundamental right to privacy. *See, e.g., Carey*, 431 U.S. at 685, 97 S.Ct. at 2016; *Eisenstadt v. Baird*, 405 U.S. at 453, 92 S.Ct. at 1038; *Prince v. Massachusetts*, 321 U.S. at 166, 64 S.Ct. at 442. Nevertheless, these opinions generally have been narrowly construed or discussed by the Court, for example, as protecting only major life decisions such as decisions related to childbearing and child rearing. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 834, 112 S.Ct. 2791, 2797, 120 L.Ed.2d 674 (1992). Moreover, the Court's narrow characterization of these cases is exemplified in *Casey*: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851,

112 S.Ct. at 2807. More recently in *Glucksberg*, the Court cautioned: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." 117 S.Ct. at 2271.

Perhaps of greater note, the Court has intimated that such protection is not available under the Due Process Clause. For example, in *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986), the Court discounted the argument for extending the right of privacy to encompass all private sexual conduct[31]:

> [A]ny claim that these [fundamental right to privacy] cases ... stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. ...

(Citation omitted) (emphasis supplied.) As the *Bowers* Court noted, the Court had addressed such a proposed extension in *Carey*:

> [W]e do not hold that state regulation must meet this [strict scrutiny] standard "whenever it implicates sexual freedom," ... or "affect(s) adult sexual relations," ... but only when it "burden(s) an individual's right to decide to

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[31] This court acknowledges that *Bowers* is distinguishable from the instant case because the underlying sexual conduct at issue in *Bowers*, homosexual sodomy, was illegal, and had been so historically.

> prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision."

431 U.S. at 689 n.5, 97 S.Ct. at 2018 n.5. Even more directly, then Justice (and now Chief Justice) Rehnquist took issue with the characterization of the majority in *Carey* that this issue remained somewhat of an open question:

> I cannot, however, let pass without comment, the statement that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults." ... While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been "definitively" established. ... [32]

431 U.S. at 718 n.2, 97 S.Ct. at 2033 n.2 (Rehnquist, J., dissenting) (citations omitted). *See also Postscript Enterprises, Inc.*, 658 F.2d at 1254 n.6 ("We assume, without having to decide, that the City of St. Louis may, through a properly drawn ordinance, restrict the sale of items which enable, aid, or encourage private consensual sexual behavior among adults.")

Absent authority directly on point, this court now turns to those factors the Supreme Court has sketched for recognition of a liberty interest as fundamental.

The Supreme Court's most recent foray into the swampy fields of substantive due process came in *Glucksberg*. As discussed above, the Court stressed that it

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[32] Justice Rehnquist cited to a case summarily affirming the conviction of an individual for violating a state sodomy law.

relies upon the following factors for firm footing in this soft area of constitutional law: (1) whether the asserted liberty interest is "objectively, deeply rooted in this Nation's history and tradition, ... and [is] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed"; and (2) "a careful description of the asserted fundamental liberty interest." 117 S.Ct. at 2267-68 (citations and internal quotation marks omitted).

Considering the second factor first, the asserted liberty interest that this court must address is dictated by the facts of the case before it. This court has no authority to pronounce broad rules of constitutional law when an Article III "case or controversy" does not demand it. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394 (1985) (stating that one of the "cardinal rules governing ... federal courts [is] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied ...") (citations and internal quotation marks omitted); *see also Flast v. Cohen*, 392 U.S. 83, 96-97, 88 S.Ct. 1942, 1950-51, 20 L.Ed.2d 947 (1968); *see generally Ashwander v. TVA*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). As stated in the introduction to Part C of this opinion, *supra*, the issue presented by plaintiffs' challenge is whether the Due Process Clause of the Fourteenth Amendment (and the concomitant fundamental right to privacy) protects an individual's liberty interest in using devices "designed or marketed as useful primarily for the stimulation of human genital organs" when engaging in lawful, private, sexual activity.

Is this liberty interest "deeply rooted" in the history and traditions of the Nation? Is this liberty interest "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed?" *Glucksberg*, 117 S.Ct. at 2267-68. This court holds it is not.

Although the actual proscription of this liberty interest does not have historical roots as deeply embedded in the value-laden soil of English speaking peoples as, say, the

proscription of sodomy, nothing presented to this court in brief or during oral argument suggests that use of sexual devices has monumental or abiding approval.[33] The Supreme Court simply has placed the bar too high to allow recognition of an individual's use of devices "designed or marketed as useful primarily for the stimulation of human genital organs" as a fundamental liberty interest.

Plaintiffs' most persuasive argument stems from the therapeutic and medical use these devices have for individuals afflicted with some form of sexual dysfunction. The argument presupposes the existence of a fundamental right to engage in lawful, private, sexual activity. This premise inheres in the fact that secondary decisions, which flow from the original decision to engage in sexual intercourse, are protected as fundamental liberty interests: for example, the right to procreate, *see Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); the right

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[33] Certain submissions to the court, and certain facts that were stipulated, establish that some level of popularity in the use of sexual devices has evolved over the past twenty years. For example, several publications and websites discuss or suggest the use of these devices in aid of achieving orgasm. The parties also have stipulated that these devices possess some therapeutic value (or at least that plaintiffs and certain experts in human sexuality believe they do).

Evidence of recent popularity notwithstanding, the most persuasive evidence supporting an argument that use of these devices can satisfy the *Glucksberg* standards is the fact that the federal Food and Drug Administration promulgated regulations concerning some of the more common sexual devices, establishing standards for their therapeutic use.

The FDA first established such regulations in 1980. *See* 45 Fed. Reg. 12684-12720 (1980); *see also Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 n.6 (8th Cir. 1981).

The twenty years of regulation proves to be the most persuasive evidence before the court, largely because it is the most longstanding. In fact, aside from references to two publications, it is the only stipulation or evidentiary submission dating from an earlier decade. The court also notes that neither of the vendor plaintiffs has operated her relevant business (at least in Alabama) for more than six years.

to use contraceptives, *see, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and the right to choose to have an abortion, *see Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Thus, plaintiffs draw the conclusion that people who have a physiological or psychological need to use sexual devices in order to perform sexually should be accorded similar protection for this liberty interest as they and others are accorded for the liberty interest in lawful, sexual intercourse.

The appeal of this argument notwithstanding, based on the Supreme Court's focus on history and tradition, the Supreme Court's express reluctance to extend the protection of the Due Process Clause, its narrow readings of cases recognizing liberty interests as fundamental, and its statements that it has not yet decided a case squarely on point, this court refuses to extend the fundamental right of privacy to protect plaintiffs' interest in using devices "designed or marketed as useful primarily for the stimulation of human genital organs" when engaging in lawful, private, sexual activity, and thereby impose a strict scrutiny frame of analysis when reviewing the Alabama statute at issue.

**D. Rational Basis Review**

Although Alabama Code § 13A-12-200.2(a)(1) has escaped strict scrutiny, it still must survive review under the rational basis test. *See, e.g., Glucksberg*, 117 S.Ct. at 2271. The Supreme Court sketched the contours of analysis for claims alleging state violation of the Due Process Clause of the Fourteenth Amendment in *Nebbia v. People of State of New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 510-11, 78 L.Ed. 940 (1934):

> [T]he Fourteenth [Amendment does] not prohibit governmental regulation for the public welfare. [It] merely condition[s] the

> exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The derivative inquiry for rational basis review asks whether a legitimate governmental interest supports the state's legislation, and, whether the resulting law bears a rational relation to that interest. *See Glucksberg*, 117 S.Ct. at 2271; *Reno v. Flores*, 507 U.S. 292, 302-05, 113 S.Ct. 1439, 1447-49, 123 L.Ed.2d 1 (1993). For such a relationship to exist, the nexus between the state interest and the law at issue must be reasonable, and thus not arbitrary, capricious, or irrational. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985) (stating, in Equal Protection analysis, that a law must not be "arbitrary or irrational"); *Western and Southern Life Insurance Company v. State Board of Equalization*, 451 U.S. 648, 668, 101 S.Ct. 2070, 2083, 68 L.Ed.2d 514 (1981) (analyzing two questions in the rational basis review under the Equal Protection Clause: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"); *Frontiero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583 (1973) ("Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."); *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d

225 (1971) (stating that statutes "must be reasonable, not arbitrary").

The Supreme Court also has prescribed the application of certain principles which assures a deferential review. Such principles include presuming the validity of challenged legislation, *see Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993); not requiring that the legislature "actually articulate ... a purpose or rationale" supporting the legislation, *id.* at 320, 113 S.Ct. at 2642 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1 (1992)), but instead placing the burden on the challenger "to negative every conceivable basis which might support [the legislation]," *Heller*, 509 U.S. at 320, 113 S.Ct. at 2642 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973)); accepting a legislature's generalizations, *see Heller* 509 U.S. at 321, 113 S.Ct. at 2643. Ultimately, however, "the reasonableness of each regulation depends upon the relevant facts." *Nebbia*, 291 U.S. at 525, 54 S.Ct. at 511.

**1. Conceivable state interests**

Although the existence of a single purpose behind any legislation probably is rare, courts must review statutes based upon the interest the state presumably acted upon, or may have acted upon. Thus, as a threshold matter, a reviewing court must identify what interests conceivably could have motivated the state's action. The Alabama Legislature aided the court in this respect, however, by stating a purpose for Act No. 98-467 in Section 1:

> **Section 1.** The Legislature of Alabama finds and declares:
>
> (1) That in order to protect children from exposure to obscenity, prevent assaults on the

> sensibilities of unwilling adults by the purveyor[s] of obscene material, and suppress the proliferation of "adult-only video stores," "adult bookstores," "adult movie houses," and "adult-only entertainment," the sale and dissemination of obscene material should be regulated without impinging on the First Amendment rights of free speech by erecting barriers to the open display of erotic and lascivious material.

1998 Ala. Acts 98-467. These findings and declarations clearly suggest that the purpose behind this act was to prohibit "open display[s]" of things "obscene," specifically those displays accessible to "children" and "unwilling adults."[34]

In addition, upon consideration of the pleadings, motions, briefs, oral arguments of counsel, and independent judicial research, the court finds that the state's interest in passing the Act also could have been: (1) the belief that "[t]he commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil, an obscenity ... detrimental to the health and morality of the state"[35] (Brief of Alabama

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[34] The only other reading of this statutory language would add a second purpose targeting the types of businesses listed in the statute for general prohibition. Such a purpose may create the type of invidious discrimination that would run afoul of the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, no party has even hinted at that motive or the argument it certainly would engender. The proper reading of this language reveals a purpose concerned with public displays, particularly those that would expose children "to obscenity," or would "assualt[] ... the sensibilities of unwilling adults."

[35] The court possibly could articulate other interests related to this one: for example, banning sexual devices in an effort to condemn just "auto-eroticism," or to condemn what the legislature may deem "deviant" sexual conduct. Any difference in such state interests is inapposite to this court's analysis, however, as it is neither conceivable

Attorney General, at 21); or (2) the desire to ban commerce in all "obscene" material.

## 2. Are the interests legitimate?[36]

### a. Banning public displays of obscene material

Alabama's interest in preventing "open display" of "obscene material" is, in the abstract, a means to suppress demonstrable, public "immorality" or, stated differently, to

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nor argued that the State targeted sexual activity related to "marriage, procreation or familial relationships." (Brief of Alabama Attorney General, at 21.)

[36] In the sections of their corrected memorandum (Doc. No. 24) and reply memorandum (Doc. No. 38) addressing rational basis review, plaintiffs focus on the fact that the targeted activity was, and remains, lawful. According to plaintiffs, the State can have no legitimate interest in discouraging lawful conduct, or targeting it with legislation. The Attorney General responds with citations to Supreme Court cases, arguing that "[a] statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 336, 73 L.Ed. 722 (1929). To the extent that the Attorney General's response answers plaintiffs' argument, this court concurs.

That concurrence notwithstanding, this court believes the Attorney General misses the point of plaintiffs' argument and, more importantly, that plaintiffs miss the point of rational basis review. Plaintiffs' argument, that the State has no legitimate interest in discouraging conduct because it is legal, is an argument properly advanced for the fundamental right inquiry, because both address the protection particular conduct, *i.e.*, a liberty interest, deserves or derives from the law. The conduct must be protected from state interference by the Constitution (and in this case the Due Process Clause of the Fourteenth Amendment), for this court to strike that law because it targets plaintiffs' conduct or liberty interest. Thus, plaintiffs' argument begs the question of whether the conduct is protected by the Due Process Clause: a question this court answered in the negative. *See* Part II.C *supra*.

effect a sense of public morality.[37] Statutes aimed at effecting a sense of public morality address legitimate state objectives. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and [the Supreme Court has] upheld such a basis for legislation." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (emphasis supplied). Thus, the basic premise of the State's action is permissible.

This state interest can be reduced from the abstract interest in morality to a slightly more specific level: targeting obscenity. Furthermore, "morality" often is the goal invoked (properly) by state legislatures to support obscenity laws, public indecency laws, and similar legislation. *See id.*, 111 S.Ct. at 2462; *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) ("The law ... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."). In fact, the Supreme Court has acknowledged other state interests that may be related to statutes addressing public morality: (1) "the interest of the public in the quality of life and the total community environment"; (2) "the tone of commerce in the great city centers"; and (3) "possibly, the public safety itself." *Paris Adult Theatre I*, 413 U.S. at 57-58, 93 S.Ct. at 2635.

The State of Alabama's interest in shielding children and "unwilling adults" from "immoral," obscene displays is a legitimate, constitutionally sound interest. *See Paris Adult Theatre I*, 413 U.S. at 57-58, 93 S.Ct. at 2635 ("[The Supreme Court has] often pointedly recognized the high importance of the state interest in regulating the exposure of

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[37] The court notes that the statute in issue is found in Title 13A, Chapter 12 of the 1975 Code of Alabama, and Chapter 12 is entitled "Offenses Against Public Health and Morals."

obscene materials to juveniles and unconsenting adults ....") (collecting cases) (citations omitted).

**b. Banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships"**

Similar to the state interest first identified, Alabama's interest in banning "the commerce of sexual stimulation and auto-eroticism, for its own sake" is an interest tied to social morality. Implicit in a legislative ban on the commerce of devices used for "sexual stimulation and auto-eroticism" is disapproval of this type of activity. The reverse may also be true: that is, allowing the sale of these devices, which inherently implicates the state's regulatory channels, is an implicit condonation of this activity. Furthermore, implicit state condonation of certain conduct, which is created by the absence of state proscription, is likely to give some semblance of approval by the general public. Without question, social approval or disapproval, or the appearance of either, will affect the mores of a particular society. Thus, Alabama's interest in public morality is directly connected to what is sold with the State's tacit approval. Accordingly, this court finds that Alabama has a legitimate interest in prohibiting the commerce of sexual devices. *See Vance*, 648 F.2d at 1035; *cf. United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) (distinguishing the protected right to possess obscene material from the right to distribute or sell it).

**c. Banning commerce of obscene material**

The reasons identified above for finding those two state objectives legitimate apply with equal force to Alabama's interest in banning the commerce of obscene material. The former Fifth Circuit found a legitimate state

interest when reviewing a Texas statute similar to the Alabama act in question: "The Texas Legislature has attempted in the challenged statute to regulate a matter of concern to the people of Texas[:] commercial transactions in obscene materials. The State has a legitimate interest in promulgating such regulations." *Vance*, 648 F.2d at 1035.[38]

### 3. Is Alabama Code § 13A-12-200.2(a)(1) rationally related to these legitimate state interests?

The statutory provision at issue makes it "unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Ala. Code § 13A-12-200(a)(1). This section further provides that "[m]aterial not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica for the sake of prurient appeal." *Id.* The first violation of this section constitutes a misdemeanor punishable by a fine of not more than $10,000 and imprisonment for not more than one year; a subsequent violation is elevated to the status of a "Class C felony."

The court now must determine whether this statutory provision bears a reasonable, rational relation to one of the legitimate state interests discussed above.

#### a. Banning public displays of obscene material

The Legislature stated in the findings and declarations section of Alabama Act No. 98-467 that its

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[38] One difference that distinguishes the Texas statute (and the challenge to it) from the Alabama Act is that the Texas statute defined sexual devices as obscene *per se*. *See Vance*, 648 F.2d at 1027.

purpose, essentially, was to protect "children" and "unwilling adults" from exposure to "open display[s]" of "obscene material." As observed above, however, it is not likely that a legislative body will have a single purpose as the lone, collective motivation for any one act. The purpose the Alabama Legislature expressly included in the Act probably was the lowest common denominator, as it were. Stated differently, the social evils the Legislature expressly identified were those that all legislators, or at least a majority of them, could agree to target and, hence, were evils that fostered the legislation to some degree. Indeed, this court found the expressed objective, as such, to be constitutionally sound.[39]

While this interest may have been one purpose motivating the entire Act, it is too discrete to support the challenged prohibition. If this interest were the State's sole interest, then Alabama Code § 13A-12-200.2(a)(1) is not rationally related thereto. The proscription, in such instance, would be absolutely arbitrary. Innumerable measures far short of an absolute ban on the distribution of sexual devices would accomplish the State's goals. In fact, the "'Tupperware'-style parties" through which plaintiff B.J. Bailey operates her entire business do not even remotely offend this state interest. In addition, the other vendor plaintiff, Sherri Williams, easily could adapt the outward appearance of her stores to accommodate such a state objective. *Cf. Turner v. Safley*, 482 U.S. 78, 91, 107 S.Ct. 2254, 2262, 96 L.Ed.2d 64 (1987) (stating that if a petitioning prisoner "can point to an alternative that fully accommodates [his] rights at *de minimis* cost to [the] valid [state interests in issue], a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard").

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[39] *See* Part II.D.2.a *supra*.

Accordingly, this court finds that the Alabama Legislature's express interest is not rationally related to the provision at issue. *Cf. Romer v. Evans*, 517 U.S. 620, 635, 116 S.Ct. 1620, 1629, 134 L.Ed.2d 855 (1996) (holding amendment to state constitution failed rational basis review under the Equal Protection Clause because "[t]he breadth of the Amendment [was] so far removed from the[] particular justifications ..."); *Turner*, 482 U.S. at 91, 107 S.Ct. at 2262 (finding that one of the asserted penological interests of the state "[did] not satisfy the reasonable relationship standard, but rather constitute[d] an exaggerated response to [its] ... concerns"); *City of Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3258 (holding zoning ordinance unconstitutional where the Court found no "rational basis for believing that the [home subject to the ordinance] would pose any special threat to the city's legitimate interests").

**b. Banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships"**

The Attorney General asserted in his brief that one conceivable interest of the State was banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships." (Brief of Alabama Attorney General, at 21.) This court found that targeting this alleged evil is a legitimate state objective. Is the prohibition of distribution of sexual devices rationally related to this interest? This court holds it is not.

First, the statutory provision does not ban actual "commerce of sexual stimulation and auto-eroticism." Rather, the statute bans commerce of devices that may be used to these ends. A statute prohibiting prostitution would ban "commerce of sexual stimulation." Thus, prohibition of sexual devices does not bear a rational relation to the

proposed state interest, when that interest is given a literal construction.

The statute fails the rational relation standard even when this interest is considered as an interest in discouraging the conduct identified in the proposed state objective: that is, "sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships." Banning commerce of sexual devices is not rationally related to this end, because such a ban inevitably interferes with sexual stimulation and auto-eroticism which is related to marriage, procreation, and familial relationships.

The use of these devices by married couples as an aid to marital relations, including sexual relations, is established by the parties' stipulations.[40] First, customers of the vendor plaintiffs include married individuals who use the devices, often upon the suggestion of a therapist, as treatment for sexual dysfunction or other marital problems. (Stipulation, ¶¶ 14, 25, 26.) Second, several of the user plaintiffs use, or have used these devices while married, to enable them to achieve a more satisfactory relation with their respective marital partners, and thereby enhance their marital relationships. (*See id.*, ¶¶ 29-33.) Such use, in fact, has improved the marital relationships of some plaintiffs. (*See id.*, ¶ 33.) Third, two undisputed experts in the field of human sexuality opine that sexual devices are effective, if not vital, in the treatment of married couples' difficulties, whether sexual or other, general difficulties. (*See id.*, ¶¶ 65, 73, 77, 82.). The experts opine that such devices help, or

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[40] Any argument derived from the fact that the stipulations or the expert opinions also indicate the proscribed devices are used by individuals who are not married, merely bolsters this court's conclusion that the users and uses of these devices cannot be so distinguished: that is, that any proscription of these devices inherently interferes with both the conduct the State sought to interfere with or discourage ("sexual stimulation and auto-eroticism, for its own sake"), and that which it did not ("sexual stimulation and auto-eroticism ... unrelated to marriage, procreation or familial relationships").

actually enable many married couples to engage in sexual relations. (*See id.*) Not surprisingly, they also state that the devices are used or prescribed commonly in sexual or marital counseling. In fact, in the opinion of Dr. Pepper Schwartz, certain sexual devices are "of medical and psychological benefit to women and their partners, an adjunct to marital and sexual therapy, and an absolute necessity in some kinds of therapeutic approaches for sexual dysfunction." (*Id.*, ¶ 82.) Dr. Alfred Jack Turner offers a perspective acquired through years as a therapist and counselor, when he claims "he has frequently seen sexual aids help in the revitalization of potentially failing marital relations." (*Id.*, ¶ 65.)

The Food and Drug Administration concurs with plaintiffs' experts to the extent that these devices are useful in treating sexual dysfunction. (*See* stipulation, ¶ 44 (citing 21 C.F.R. §§ 884.5490, .5960 (1984)).) Other courts have recognized the therapeutic value of sexual devices, *see People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985); *State v. Hughes*, 792 P.2d 1023, 1031-32 (Kan. 1990), as have some state legislatures, *see* Ga. Code Ann. § 16-12-80(e)(2); Miss. Code Ann. § 97-29-107(b). In addition, this court finds it of some note that a common name for the proscribed devices, and a name which the Attorney General recognizes as such in brief, is "marital aids." (Brief of Alabama Attorney General, at 1.)

The court finds that the information above establishes that the sexual devices in issue are used by married individuals to aid their marital relationships, and to facilitate or enable sexual performance with their respective spouses. It follows that a ban on the commerce of these devices interferes with "sexual stimulation and auto-eroticism" which is related "to marriage, procreation[,] or familial relationships." This effect is one the State specifically sought to avoid,[41] but one that was unavoidable with an

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[41] *See* note 35 and accompanying text, *supra*.

absolute legislative ban on the commerce of sexual devices. The challenged legislation, therefore, bears no rational relation to this state interest.

**c. Banning commerce of obscene material**

Alabama has a legitimate interest in banning commerce of obscene material generally, without confining the legislation to public displays. *See Paris Adult Theatre I*, 413 U.S. at 57, 93 S.Ct. at 2635 ("[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby."). The statutory provision at issue in this case is a ban on distribution of sexual devices. These devices "express" nothing. Consequently, this case, contrary to most cases in which courts review obscenity laws, does not involve a First Amendment challenge. Thus, the court must address whether banning the sale of these "non-expressive" devices is rationally related to the Alabama's interest in banning obscene material generally.

**(1) What can be classified as "obscene"?**

Obscenity traditionally has been identified by an appeal to an interest in sex which is "over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394 (1985). The Supreme Court has quoted the following Model Penal Code definition of obscenity with approval: "material whose predominate appeal is to a shameful or morbid interest in nudity, sex, or excretion." *Id.* 105 S.Ct. at 2799 (internal quotation marks omitted). The term and concept of "prurience" often is invoked to identify obscenity, and "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex ..." *Id.* at 497, 504,

105 S.Ct. at 2798, 2802 (citing *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).

In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Supreme Court established a three-pronged inquiry to guide courts in identifying obscenity. *Miller* involved a First Amendment challenge by an individual convicted under a California obscenity statute for mailing advertisements of allegedly obscene, "adult material." The Court began its analysis by reiterating the general principle that "obscene material is unprotected by the First Amendment. ..." 413 U.S. at 23, 93 S.Ct. at 2614 (citations omitted). Thus, the issue the Court addressed in *Miller* was: what material is obscene? The Court first narrowed its inquiry, holding that the permissible scope of state statutes designed to regulate obscene materials is confined to "works which depict or describe sexual conduct." *Id.* at 24, 93 S.Ct. at 2614-15. Ultimately, the Supreme Court held that:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.*, 93 S.Ct. at 2615 (citations and internal quotation marks omitted).

Section 13A-12-200.1(17) of the Alabama Code adopts the *Miller* standards to define what material depicting

or describing sexual conduct is obscene.[42] Neither this definition nor the challenged provision expressly includes or identifies sexual devices as obscene.[43]

**(2) What are the devices "designed or**

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[42] Section 13A-12-200.1(17) reads:

> (17) OBSCENE. The term means that:
>
> a. The average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest; and
>
> b. The material depicts or describes, in a patently offensive way, sexual conduct, actual or simulated, normal or perverted; and
>
> c. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political or scientific value.

[43] In fact, one word in section 13A-12-200.2(a)(1)—the disjunctive "or"—impliedly excludes sexual devices from the material identified as obscene: "It shall be unlawful for any person to knowingly distribute ... any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs ...." (Emphasis supplied.) The intended distinction perhaps could be that the devices do not classify as "material" (which would negate any concern over the following language). Nevertheless, the statute then provides that "material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal." Ala. Code § 13A-12-200.2(a)(1). The court finds this language inapposite to its analysis for three reasons. First, a proper construction of the statute considers this language as applicable only to the aforementioned "material," which the statute itself distinguishes from devices. Second, this language still is confined to the traditional notions of obscenity, *i.e.*, the concept of prurience. This provision seeks to establish certain "erotica" as obscene. "Erotica" is defined as s20 "literature or art intended to arouse sexual desire." Webster's II: New Riverside University Dictionary 441 (3d ed. 1994). The devices in issue are neither literature nor art; they are, by definition, "designed or marketed as useful primarily for the stimulation of human genital organs."

**marketed as useful primarily for the stimulation of human genital organs"?**

The sexual devices that section 13A-12-200.2(a)(1) prohibit include devices which depict human genitals. Those devices generally are designed for use as such organs and are used in sexual acts. They include penis-shaped dildos and artificial vaginas. Many sexual devices do not represent human genitals, however, and some bear absolutely no resemblance to such organs. Other common sexual devices noted in the record include: vibrators and other stimulators, which may or may not be in the form of a penis, and may or may not be designed for insertion into the vagina; penis extenders; penis enlargement pumps; genital rings; anal beads; and inflatable dolls.

**(3) Are these devices obscene?**[44]

The court will first consider the three basic guidelines set forth in *Miller*. The court questions the applicability of the *Miller* analysis outside the First Amendment context,[45]

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[44] It is within this court's province to determine as a matter of law whether the devices at issue in this constitutional challenge are obscene, or may reasonably be found obscene. *See Penthouse International, Ltd. v. McAuliffe*, 702 F.2d 925, 928 (11th Cir. 1983); *see also Jenkins v. Georgia*, 418 U.S. 153, 160, 94 S.Ct. 2750, 2755, 41 L.Ed.2d 642 (1974).

[45] The former Fifth Circuit in *Reeves v. McConn*, 638 F.2d 762, 764 (5th Cir. March 1981), limited the *Miller* analysis to printed material: "With regard to printed obscenity, the constitutional limits of state or federal regulations were set out in *Miller*." (Emphasis supplied.) Furthermore, the Supreme Court in *Miller* held that the permissible scope of state statutes designed to regulate obscene materials is confined to "works which depict or describe sexual conduct." 413 U.S. at 24, 93 S.Ct. at 2614-15. The Court noted this limitation recently in Reno v. American Civil Liberties Union, 521 U.S. 844, ___, 117 S.Ct. 2329, 2345, 138 L.Ed.2d 874: "[T]he *Miller* definition is limited to 'sexual conduct' ..."

however, and accordingly modifies these guidelines slightly, so they may provide guidance in the analysis of "non-expressive" devices. Thus, the court now considers: (1) whether the average person, applying contemporary community standards, would find that the proscribed devices appeal to the prurient interest; (2) whether the proscribed devices, standing alone, are patently offensive; and (3) whether the proscribed devices, taken as a whole, lack serious artistic, political, or scientific value.

Prurient interests should not be equated with normal, healthy interests in sex. *Brockett*, 472 at 498, 105 S.Ct. at 2799. As stated above, prurience indicates a "shameful or morbid interest in nudity, sex, or excretion." *Id.*, 105 S.Ct. at 2799. In this community, do particular sexual devices appeal to such a shameful or morbid interest? Although the popular literature available at numerous retail outlets throughout Huntsville and northeastern Alabama generally suggest not,[46] the Alabama legislature apparently believes so.[47] Many, and perhaps a majority of sexual devices, most notably vibrators and other stimulators, appear innocuous and have no appeal to prurient interests, nor are they patently offensive. The court finds, however, that certain devices (including some vibrators) which are designed as representations of human genitals may have such prurient appeal. As such, these devices are likely to be patently offensive. The device that best fits this description is a penis-shaped dildo. Nevertheless, these dildos and most other devices which may

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[46] As stated above, this part of the obscenity analysis considers the standards of the local community: that is, the judicial district in which this court sits, the Northern District of Alabama. *See* Hamling v. United States, 418 U.S. 87, 105-06, 94 S.Ct. 2887, 2901-02, 41 L.Ed.2d 590 (1974).

[47] This presumption assumes that banning commerce of obscenity was in fact the state's interest in passing the Act. The court notes, however, that the statute does not define sexual devices as obscene *per se*. Nevertheless, there are limits on what a legislature may deem offensive. *See id.* at 114, 94 S.Ct. at 2905.

be found to have prurient appeal and to be patently offensive, also have therapeutic, medical value.[48] Thus, these devices are not obscene under the guidelines set forth in *Miller*.

Even if neither *Miller* nor the adapted guidelines are applicable, the statute as well as traditional obscenity jurisprudence focuses on the concept of "prurience."[49] *See Brockett*, 472 U.S. at 497, 504, 105 S.Ct. at 2798, 2802 (citing *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). In this community, only the certain few types of sexual devices noted above may reasonably be found to appeal to shameful or morbid interests in sex, nudity, or excretion.[50]

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[48] *See* Part II.D.3.b *supra*. While the expert opinions, the attestations of plaintiffs, and the literature available in local retail outlets provide evidence of community standards for what appeals to "prurient interests" and what is "patently offensive," the regulations of the FDA conclusively establish the scientific and medical value of certain devices on a national level. Of course, the expert opinions and popular literature offer a national perspective for this inquiry, and the two previous inquiries as well. The court's determination regarding scientific and medical value is not limited to a local community standard, rather the court analyzes the material at issue from the perspective of a reasonable person. *See* Pope v. Illinois, 481 U.S. 497, 500-01, 107 S.Ct. 1918, 1920-21, 95 L.Ed.2d 439 (1987).

[49] In fact, the Alabama Legislature seeks to broaden the statutory definition of obscenity which adopted the *Miller* standards, by including in section 13A-12-200.2(a)(1) that: "material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal." Even this proposed extension focuses on prurience. For a discussion of this language, see note 43, *supra*.

[50] If this court were to consider the devices as "erotica," perhaps some devices which are found to have no therapeutic value could be deemed obscene under this statute. For example, the sale of anal beads and devices used for sado-masochistic purposes may constitute "commercial exploitation of erotica solely for the sake of prurient appeal." *See* Mishkin v. New York, 303 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); Ward v. Illinois, 431 U.S. 767, 92 S.Ct. 2085, 52 L.Ed.2d 738 (1977) (reaffirming *Mishkin* after the *Miller* standards for

Indeed, certain devices may be found obscene and, therefore, in furtherance of the state's interest in prohibiting the commerce of obscenity. However, the rub lies in the fact that a majority, or at least a significant minority, of the proscribed devices, as a matter of law, are not obscene under any established definition of obscenity. This fact notwithstanding, anyone who engages in the distribution of sexual devices faces, upon first conviction, a fine of up to $10,000 and imprisonment for up to one year. *See* Ala. Code § 13A-12-200.2(a)(1). Thus, the vendor plaintiffs face the spectre of a substantial fine and incarceration if they decide to continue their businesses. Moreover, users of these devices will be denied therapy for, among other things, sexual dysfunction. These widespread deleterious effects notwithstanding, the Alabama Legislature banned the distribution of all sexual devices in an effort to prohibit the few which may be found obscene.

Therefore, the court finds that the prohibition in issue is an exaggerated response to the State's concerns, and an overly broad means of regulating or prohibiting commerce of obscenity. *Cf. Romer v. Evans*, 517 U.S. 620, 635, 116 S.Ct. 1620, 1629, 134 L.Ed.2d 855 (1996) (holding amendment to state constitution failed rational basis review under the Equal Protection Clause because "[t]he breadth of the Amendment [was] so far removed from the[] particular justifications ..."); *Turner*, 482 U.S. at 91, 107 S.Ct. at 2262 (finding that one of the asserted penological interests of the State "[did] not satisfy the reasonable relationship standard, but rather constitute[d] an exaggerated response to [its] ... concerns"); *City of Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3258 (holding zoning ordinance unconstitutional where the Court found no rational basis for believing that the [home subject to the ordinance] would pose any special threat to the city's legitimate interests").

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obscenity were announced). Such a construction of the statute, however, would be plainly inconsistent with the statutory language.

Accordingly, this court finds that the prohibition on the distribution of sexual devices, found in Alabama Code § 13A-12-200.2(a)(1), bears no reasonable, rational relation to a legitimate state interest and is, therefore, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[51]

## III. CONCLUSION

For the reasons stated above, this court finds that plaintiffs' motion for permanent injunctive relief is due to be granted. An order consistent with this memorandum opinion will be entered contemporaneously herewith.

**DONE** this ____ day of March, 1999.

United States District Judge

[51] This court has no authority to offer a "saving construction" to a state statute: that is, construe the statute in a manner that would obviate any constitutional infirmity. Rather, this court determines whether the statute in issue exceeds the bounds of the Constitution. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 1405, 28 L.Ed.2d 822 (1971) ("[Federal courts] lack jurisdiction authoritatively to construe state legislation."); Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972) (in absence of decision by state court limiting scope of statute, federal court lacked authority to narrowly construe statute and avoid facial constitutional challenge); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) ("[A]s a federal court, we must be particularly reluctant to rewrite the terms of a state statute.")

**APPENDIX B**

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10798

D.C. Docket No. 98-01938-CV-S-NE

SHERRI WILLIAMS, B.J. BAILEY, et al.,

*Plaintiffs-Appellees,*

v.

BILL PRYOR, in his official capacity as the Attorney General of the State of Alabama,

*Defendant-Appellant.*

Jan. 31, 2001

Appeal from the United States District Court for the

Northern District of Alabama

**ON PETITION FOR REHEARING**

Before ANDERSON, Chief Judge, BLACK and HALL*, Circuit Judges. BLACK, Circuit Judge:

The opinion filed in this case on October 12, 2000, is withdrawn, and the following opinion is substituted in its place. The petition for rehearing filed by Appellees is otherwise DENIED.

In 1998, a statute enacted by the legislature of the State of Alabama amended the obscenity provisions of the Alabama Code to make the distribution of certain defined sexual devices a criminal offense. Vendors and users of such

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* Honorable Cynthia Holcomb Hall, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

devices filed a constitutional challenge to the statute. The district court declined to hold the statute violated any constitutional right but determined the statute was unconstitutional because it lacked a rational basis. The court permanently enjoined enforcement of the statute. We reverse and remand.

## I. BACKGROUND

The case was tried by the district court from the parties' extensive stipulated facts, reprinted in full in the district court's published opinion. *See Williams v. Pryor,* 41 F.Supp.2d 1257, 1261-1273 (N.D.Ala.1999).

After the 1998 amendment, the Alabama Code obscenity provisions provide, in pertinent part, the following:

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material *or any device designed or marketed as useful primarily for the stimulation of human genital organs* for any thing of pecuniary value.

*Id.* at 1259 (quoting Ala.Code § 13A-12-200.2(a)(1) (Supp.1998)).[1] A first violation is a misdemeanor punishable by a maximum fine of $10,000 and up to one year of jail or hard labor; a subsequent violation is a class C felony. *See id.* The State has conceded the statute's proscription of the distribution of sexual devices in Alabama does not apply to devices acquired as gifts or by purchases in another state. *See id.* at 1265. The statute also does not restrict possession or

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[1] We adopt the district court's usage of the shorthand term "sexual device" in place of the cumbersome phrase "device designed or marketed as useful primarily for the stimulation of the human genital organs."

use of a sexual device by an individual, but only the commercial distribution of the devices. *See id.*

The plaintiffs-appellees are vendors or users of sexual devices. *See id.* at 1261-65. The stipulated facts contain two expert opinions that describe the standard medical and psychological therapeutic uses of sexual devices, including their frequent prescription in marital and non-marital sexual or relationship counseling--often as a necessary component for successful therapy. *See id.* at 1265-73. The facts also describe a number of other sexual products the distribution of which is not prohibited by the statute, such as ribbed condoms or the virility drug Viagra. *See id.* at 1265.

The district court performed a careful evaluation of the plaintiffs' constitutional challenges. After considering Supreme Court precedent, the court determined the statute does not implicate previously recognized fundamental constitutional rights. *See id.* at 1275-84. The court also declined to extend those rights to provide a fundamental right to the use of sexual devices, a right that would be burdened by the statute. *See id.* The district court next reviewed the statute under rational basis scrutiny and concluded the statute lacked a rational basis. *See id.* at 1284-1293. The court accordingly held the statute unconstitutional and issued a permanent injunction against its enforcement. *See id.* at 1293.

We review de novo the district court's decision on the constitutionality of a statute. *See, e.g., Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir.2000); *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1335 (11th Cir.2000); *United States v. Hester*, 199 F.3d 1287, 1289 (11th Cir.2000).

## II. ANALYSIS

Whether a statute is constitutional is determined in large part by the level of scrutiny applied by the courts.

Statutes that infringe fundamental rights, or that make distinctions based upon suspect classifications such as race or national origin, are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest. *See, e.g., Reno v. Flores,* 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993); *Adarand Constructors v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995). Most statutes reviewed under the very stringent strict scrutiny standard are found to be unconstitutional. *But see United States v. Virginia,* 518 U.S. 515, 532 n. 6, 116 S.Ct. 2264, 2275 n. 6, 135 L.Ed.2d 735 (1996) ("strict scrutiny ... is not inevitably fatal in fact") (quotation omitted). On the other hand, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 632, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996); *see also, e.g., Washington v. Glucksberg,* 521 U.S. 702, 728, 117 S.Ct. 2258, 2271, 138 L.Ed.2d 772 (1997); *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 314, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). Almost every statute subject to the very deferential rational basis scrutiny standard is found to be constitutional. *Cf., e.g., Panama City Medical Diagnostic Ltd. v. Williams,* 13 F.3d 1541, 1546-47 (11th Cir.1994) (discussing "arguable" rational bases for statute). We consider first the district court's determination that the statute is unconstitutional because it fails rational basis scrutiny.

**A. Rational Basis Review**

Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power. A statute is constitutional under rational basis scrutiny so long as "there is *any reasonably conceivable state of facts* that could provide a rational basis for the" statute. *FCC v. Beach Communications, Inc.,* 508

U.S. 307, 314, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (emphasis added). The Supreme Court has explained that:

> Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint....
>
> On rational-basis review, ... a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the [statute] have the burden to *negative every conceivable basis which might support it.* Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason ... actually motivated the legislature.... In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

*Id.* at 313-15, 113 S.Ct. at 2101-02 (citations and quotations omitted) (emphasis added). In addition, "the legislature must be allowed leeway to approach a perceived problem incrementally," even if its incremental approach is significantly over-inclusive or under-inclusive. *Id.* at 316, 113 S.Ct. at 2102; *see also, e.g., Heller v. Doe by Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993); *Haves v. City of Miami,* 52 F.3d 918, 923 (11th Cir.1995). Only in an exceptional circumstance will a statute

not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny.[2]

The district court systematically considered whether the Alabama sexual devices distribution criminal statute has a rational basis. *See* 41 F.Supp.2d at 1284-1293. First, the court examined three interests it believed had been relied upon by the State: banning the public display of obscene material, banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships," and banning the commerce in obscene material. *Id.* at 1286-87. The district court concluded each of these interests was a legitimate interest the State constitutionally could pursue. *See id.* Second, the court considered whether prohibiting the distribution of sexual devices is rationally related to these legitimate interests. For each interest, the court concluded the law did not rationally advance the State's objective. *See id.* at 1288- 93. With respect to public decency, the district court found the ban on the distribution of sexual devices to be "absolutely arbitrary" because "[i]nnumerable measures far short of an absolute ban on the distribution of sexual

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[2] An example of such an exceptional circumstance recognized by this Court is the irrationality of government attempts to regulate the dress and grooming of adults. *See DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1368-70 (11th Cir.1987) (invalidating town ordinance requiring male joggers to wear shirts); *Lansdale v. Tyler Junior College*, 470 F.2d 659, 662-63 (5th Cir.1972) (en banc) (adopting presumption that state's interests in education and educational environment did not rationally justify hair-length regulation at junior college, although under *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.1972) (en banc), those interests presumptively could rationally justify dress and grooming regulations in high schools); *also compare Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir.1975) (holding under *Lansdale* that junior college could not fire faculty member for refusing to shave beard), *with Domico v. Rapides Parish School Bd.*, 675 F.2d 100 (5th Cir.1982) (holding that school board may apply dress code to employees of high school), *and Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (sustaining hair grooming regulation in police department).

devices would accomplish the State's goals." *Id.* at 1288. The court also determined the ban was irrationally related to the interest in discouraging commerce in auto-eroticism because the ban, by its very terms, also interfered with the very sexual stimulation and eroticism related to marriage and procreation with which the State disclaimed any intent to interfere. *See id.* at 1288-90. Finally, the court concluded the statute was an irrational means of banning obscenity because Alabama "banned the distribution of *all* sexual devices in an effort to prohibit the few which may be found obscene." *Id.* at 1293. The court therefore held the statute failed rationally to advance any legitimate state interest and accordingly was unconstitutional. *See id.*

We conclude the district court erred in determining the statute lacks a rational basis. The State's interest in public morality is a legitimate interest rationally served by the statute. The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (citing *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).[3] A statute banning the commercial distribution of sexual devices is rationally related to this interest. Alabama argues "a ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally

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[3] In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1395-97, 146 L.Ed.2d 265 (2000); *Barnes*, 501 U.S. at 569, 111 S.Ct. 2461-62. For purposes of consistency in this case, however, we will refer to the interest as legitimate.

related to a legitimate legislative interest in discouraging prurient interests in autonomous sex" and that "it is enough for a legislature to reasonably believe that commerce in the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State." Appellant's Brief at 13, 16. The criminal proscription on the distribution of sexual devices certainly is a rational means for eliminating commerce in the devices, which itself is a rational means for making the acquisition and use of the devices more difficult. Moreover, incremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices, rather than prohibiting their possession or use or by directly proscribing masturbation with or without a sexual device. Thus, we hold the Alabama sexual devices distribution criminal statute is constitutional under rational basis scrutiny because it is rationally related to at least one legitimate State interest.

In addition, the district court's application of rational basis scrutiny to the three state interests it considered was erroneous because the court relied heavily upon three Supreme Court decisions, *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), in concluding the statute does not rationally advance the State's interests the district court conceded were legitimate. *See* 41 F.Supp.2d at 1288, 1293. These cases do not support the district court's application of rational basis scrutiny in this case.

First, the *Turner v. Safley* decision established a deferential reasonableness standard as the level of scrutiny to be applied when a prison regulation infringes an inmate's constitutional interests. *See Turner,* 482 U.S. at 89-91, 107 S.Ct. at 2261-63. Although similar in part (and sometimes in description) to ordinary rational basis review, the *Turner* standard requires a more searching, four-part inquiry. The

first prong considers whether the prison regulation is rationally related to a legitimate penological interest (a class of interests more narrow than those considered under ordinary rational basis review); the other prongs address whether the inmate has alternative means of exercising the constitutional right, the burden on the prison in accommodating the right, and whether the regulation is an exaggerated response to prison concerns. *See id.* at 89-91, 107 S.Ct. at 2261-63; *see also, e.g., O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-53, 107 S.Ct. 2400, 2404-07, 96 L.Ed.2d 282 (1987); *Pope v. Hightower,* 101 F.3d 1382, 1384 (11th Cir.1996); *Harris v. Thigpen,* 941 F.2d 1495, 1516 (11th Cir.1991). Accordingly, cases decided under the *Turner* standard, and *Turner* itself, are inapplicable to cases, like this one, concerning the constitutional protection accorded by ordinary rational basis scrutiny to citizens in free society.

Second, the district court also erred by applying *Romer v. Evans.* In *Romer,* the Supreme Court invalidated a provision of the Colorado state constitution that imposed a special limitation on participation in the political process upon one group, homosexuals. Applying rational basis scrutiny, the Court held that Colorado's provision was unconstitutional. *See* 517 U.S. at 632, 116 S.Ct. at 1627. As described by the Court, the provision "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies," *id.* at 627, 116 S.Ct. at 1625, "bars homosexuals from securing protection against the injuries that these public-accommodations laws address," and "operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government," *id.* at 629, 116 S.Ct. at 1626, resulting in a situation in which "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination

only by enlisting the citizenry of Colorado to amend the State Constitution." *Id.* at 631, 116 S.Ct. at 1627. The Court then noted that "[t]he resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.... It is not within our constitutional tradition to enact laws of this sort.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633, 116 S.Ct. at 1628. The significance of *Romer,* therefore, is the Court's holding that Colorado's provision had not been enacted in pursuit of any legitimate government interest: the provision was "an exceptional and ... invalid form of legislation." *Id.* at 632, 116 S.Ct. at 1627. The State had no legitimate interest in imposing an inability to obtain the protection of anti-discrimination laws (without amending the state constitution) on any particular group, including homosexuals.[4] *Cf. Shahar v. Bowers,* 114 F.3d 1097, 1110 (11th Cir.1997) (en banc) ("*Romer* ... struck down an amendment to a state constitution as irrational because the amendment's sole purpose was to disadvantage a particular class of people"); *id.* at 1126 (Birch, J., dissenting) ("the Court rejected the state's

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[4] The *Romer* Court also discussed whether the Colorado provision was rationally related to a government interest. The Court determined the provision's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," *id.* at 632, 116 S.Ct. at 1627, and that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 635, 116 S.Ct. at 1629. Although discussed in terms of the rationality of the relationship of means to ends, in effect the Court reasoned that the type of means adopted showed that no legitimate end was being pursued: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 634, 116 S.Ct. at 1628, amounting to "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635, 116 S.Ct. at 1629.

rationale, declaring that animosity toward the class of homosexuals is not a legitimate basis for state action") (quotation omitted). The statute at issue in this case, however, raises no similar concerns. The district court agreed the three state interests it discussed were legitimate, *see* 41 F.Supp.2d at 1286-87, and we have held there is at least one legitimate state interest, the regulation of public morality, that justifies this statute. Consequently, *Romer*'s holding that the Colorado provision was supported by no legitimate state interest has no bearing in this case.

Third, the Equal Protection Clause as-applied analysis of *City of Cleburne* has little relevance to the fundamental rights facial challenge raised by the plaintiffs in this case. The Supreme Court recently reaffirmed that the Equal Protection Clause is violated (in cases in which heightened scrutiny does not apply) when the plaintiff—whether a class, group, or simply one individual—proves "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060 (2000) (holding that plaintiff stated constitutional Equal Protection Clause cause of action by alleging that village acted irrationally, wholly arbitrarily, and out of malice toward plaintiff when it demanded 33-foot easement from plaintiff, contrary to 15-foot easements obtained from others similarly situated). In *City of Cleburne,* the Court had applied this principle in holding that the city had violated the Equal Protection Clause by requiring a special use permit for a group home for mentally disabled persons but not for many other similar kinds of group homes. After rejecting the application of heightened scrutiny, *see* 473 U.S. at 442, 105 S.Ct. at 3255, the Court considered the city's arguments that the permit requirement was based on the following government interests: neighbors' negative opinions and fears of elderly neighbors, proximity to a junior high school, location on a flood plain, size of the home and number of

residents it would house, fire hazards, neighborhood serenity, and danger to neighbors. *See id.* at 448-50, 105 S.Ct. at 3259-60. The Court did not discount the legitimacy of these interests, but rather found that, in creating the means used to carry out these interests, the city had adopted a classification that had no rational basis:

> The city does not require a special use permit ... for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded.... But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view *the record does not reveal any rational basis* for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

*Id.* at 447-48, 105 S.Ct. at 3258 (emphasis added).[5] In this case, by contrast, the plaintiffs have presented a fundamental rights facial challenge to the Alabama statute; they have not alleged an Equal Protection Clause violation, much less argued that the statute would make any irrational classifications among persons in its enforcement. Accordingly, the rational basis analysis of *City of Cleburne* does not support the district court's conclusion that this statute lacks a rational basis.

Finally, the plaintiffs maintain the district court did not err in finding the statute to be constitutionally irrational because Alabama's statute is contrary to a wide spectrum of public and professional opinions. The plaintiffs argue these opinions recognize numerous legitimate and beneficial uses of sexual devices, especially the necessity of sexual devices for some persons to achieve medical or emotional health. However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither

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[5] Similar to *Romer*, the *City of Cleburne* Court noted that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450, 105 S.Ct. at 3260. Unlike *Romer*, however, this conclusion was directed not to the legitimacy of the city's ends, but rather bolstered the Court's determination that the classification of persons drawn by the city in carrying out its ends was constitutionally irrational.

affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

For the foregoing reasons, we hold the Alabama statute challenged in this case has a rational basis. We therefore reverse the district court's judgment to the contrary.

**B. Fundamental Rights Analysis**

In their fundamental rights arguments, the plaintiffs challenged the constitutionality of the statute on its face and as applied. We conclude the district court correctly rejected the facial challenge, but we remand the as-applied challenges.

**1. Facial Challenge**

"A facial challenge to be successful 'must establish that *no* set of circumstances exists under which the Act would be valid.'" *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir.1999) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)); *see also United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir.2000) (stating that "no set of circumstances" is the general rule for evaluating facial challenges in this circuit); *Jacobs v. Florida Bar*, 50 F.3d 901, 906 n. 20 (11th Cir.1995) ("[W]hen a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied") (citing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988)). Unless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality.

Initially, we must determine how to frame the nature and scope of a constitutional right that would facially invalidate the Alabama statute. Alabama maintains the

plaintiffs are claiming simply a "right to sell or buy" sexual devices. Such a right would receive little constitutional protection because ordinary economic and commercial regulations are subject only to rational basis scrutiny. *See, e.g., Beach Communications,* 508 U.S. at 314, 113 S.Ct. at 2101 ("In areas of social and economic policy, ... any reasonably conceivable state of facts that could provide a rational basis for the" statute is sufficient to sustain its constitutionality); *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). The plaintiffs respond that a right of greater constitutional significance is at stake: in the narrowest sense, the plaintiffs assert a fundamental "right to use" sexual devices; more generally, the plaintiffs invoke the Supreme Court's cases establishing a constitutionally protected fundamental right to privacy. The district court narrowly framed the analysis as the question "whether the concept of a constitutionally protected 'right to privacy' protects an individual's liberty to use [sexual devices] when engaging in lawful, private, sexual activity." 41 F.Supp.2d at 1275; *see also id.* at 1281 & n. 30. For purposes of the facial challenge, the right is more precisely stated as whether the Constitution protects such liberty of *every* individual.

In light of the Supreme Court's decision in *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), we conclude the district court correctly framed the fundamental rights analysis in this case. Following its decisions holding a state may not criminalize every sale or distribution of contraceptives, *see Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the Supreme Court struck down a narrower New York law criminalizing the sale of contraceptives to persons under 16 years of age and the sale of contraceptives by non-pharmacists. *See Carey,* 431 U.S. at 681-82, 97 S.Ct. at 2014. The Court explained that:

> [T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions.... This is so not because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Eisenstadt v. Baird,* and *Roe v. Wade.*

431 U.S. at 687-89, 97 S.Ct. at 2017-18; *see also id.* at 689-91, 97 S.Ct. at 2108-19 (concluding that New York law fails strict scrutiny for lack of compelling state interest). Similarly, because the statute prohibiting the distribution of sexual devices would burden an individual's ability to use the devices, the analysis in this case must be framed not in terms of whether the Constitution protects a right to sell or buy sexual devices, but rather in terms of whether there is a fundamental constitutional interest--broad or narrow--that encompasses a right to use sexual devices and invalidates this statute on its face.

We conclude there is no controlling precedent that specifically establishes the facial unconstitutionality of this statute.[6] The fundamental constitutional rights of privacy

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[6] Alabama suggests two precedents interpreting similar statutes, *Sewell v. Georgia,* 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978), and *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020 (5th Cir. June 1981) (binding authority under *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc)), establish the constitutionality of this statute. We conclude neither decision is controlling here. The Supreme Court in *Sewell* dismissed an appeal from the Supreme Court of Georgia for want of a substantial federal question, *see* 435 U.S. at 982, 98 S.Ct. at

recognized to date by the Supreme Court in the area of sexual activity each have followed from the Court's protection of a person's right to make the decision not to procreate without governmental interference. Specifically, the Court has repeatedly sustained a right to prevent pregnancy through the use of contraceptives, *see Griswold*, 381 U.S. at 479, 85 S.Ct. at 1678; *Eisenstadt*, 405 U.S. at 438, 92 S.Ct. at 1029; *Carey*, 431 U.S. at 678, 97 S.Ct. at 2010, as well as a woman's qualified right to terminate a pregnancy, *see, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). More than half a century ago, the Court also protected the right to procreate, invalidating a state's provision for involuntary sterilization of habitual criminals. *See Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The Court also has recognized other fundamental rights, including rights of privacy unrelated to sexual activity, that protect personal autonomy from governmental intrusion. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (sustaining right to refuse medical treatment); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (invalidating ban on interracial marriage). None of these cases, however, is decisive on the question whether the Constitution protects every individual's right to private sexual activity and use of sexual devices from being burdened by Alabama's sexual device distribution criminal statute.

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1635, a disposition that "prevent[s] lower courts from coming to opposite conclusions on the *precise* issues presented and *necessarily* decided by those actions." *Langelier v. Coleman*, 861 F.2d 1508, 1511 (11th Cir.1988) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977)) (emphasis added). The only issues necessarily decided in *Sewell*, however, were First Amendment obscenity arguments. *See Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187, 188-89 (1977). Similarly, *Vance* decided only a First Amendment obscenity challenge. *See* 648 F.2d at 1027-28.

We therefore must determine whether we may, in this case, recognize an "extension of the 'right to privacy[,]' which the Supreme Court has recognized as fundamental in certain contexts," that is broad enough to facially invalidate the Alabama statute. 41 F.Supp.2d at 1275; *see id.* at 1282. This circuit has recognized that a state may regulate materials deemed harmful to minors. *See American Booksellers v. Webb*, 919 F.2d 1493, 1500-01 (11th Cir.1990); *see also Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (state may constitutionally regulate well-being of minors, and within this power to regulate is the power to restrict access to materials rationally deemed to be harmful to minors). Application of Alabama's statute to those who sell sexual devices to minors, to such extent that those devices are deemed harmful to minors, would not violate any fundamental right. The statute has possible constitutional applications and therefore is not facially unconstitutional. The district court correctly rejected the plaintiffs' facial challenge to the statute.

**2. As-Applied Challenges**

We conclude the district court did not adequately consider the as-applied fundamental rights challenges raised by the plaintiffs. Accordingly, we remand for the district court to consider these claims in the first instance.

The district court failed to specifically consider the as-applied challenges raised by the four "user" plaintiffs. Betty Faye Haggermaker and Alice Jean Cope are married women who use sexual devices with their husbands. *See* 41 F.Supp.2d at 1264. Sherry Taylor-Williams and Jane Doe began using sexual devices in marital intimacy but both are now single. *See id.* at 1264-65. Although the statute is not facially unconstitutional because, in light of *Webb* and *Ginsberg*, it may constitutionally be applied to those who sell to minors sexual devices which are deemed harmful to

minors, the as-applied challenges raised by the plaintiffs, married or unmarried, implicate different and important interests in sexual privacy. *See Griswold,* 381 U.S. at 485-86, 85 S.Ct. at 1682 ("Would we allow the police to search the sacred precincts of marital bedrooms? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); *Glucksberg,* 521 U.S. at 720, 117 S.Ct. at 2267 (citing *Griswold* as holding the Constitution protects a fundamental right "to marital privacy"); *see also Casey,* 505 U.S. at 898, 112 S.Ct. at 2831 (invalidating provision requiring notification of married woman's spouse before abortion could be performed because "[w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family"); *Eisenstadt,* 405 U.S. at 453, 92 S.Ct. at 1033 ("[T]he rights of the individual to [have] access to contraceptives ... must be the same for the unmarried and married alike.");*Bowers v. Hardwick,* 478 U.S. 186, 209 n. 4, 106 S.Ct. 2841, 2853 n. 1, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting) (questioning validity of categorizations of sexual activity depending on marital status); *id.* at 216, 106 S.Ct. at 2857 (Stevens, J., dissenting) (citing *Eisenstadt* and *Carey* as holding that fundamental rights protection in sexual matters "extends to intimate choices by unmarried as well as married persons").

We remand the as-applied challenges for due consideration by the district court because the record and stipulations in this case simply are too narrow to permit us to decide whether or to what extent the Alabama statute infringes a fundamental right to sexual privacy of the specific plaintiffs in this case. In *Glucksberg,* its most recent case in which an argument for recognition of a new fundamental right was presented, the Supreme Court instructed that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition" and

"implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right] were sacrificed." 521 U.S. at 720-21, 117 S.Ct. at 2268 (citations and quotations omitted). In concluding the Constitution did not include such a fundamental right of physician-assisted suicide, the Court discussed at length not only the long history of the proscription of suicide and assisting suicide but also the considerable contemporary nationwide legislative action to preserve such laws. *See id.* at 710-19, 117 S.Ct. at 2262-67. By contrast, in this case the district court considered in two paragraphs only whether the "use of sexual devices" is a deeply rooted and central liberty. *See* 41 F.Supp.2d at 1283- 84 & n. 33. The court analyzed neither whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines any such history. The record is bare of evidence on these important questions. Absent the kind of careful consideration the Supreme Court performed in *Glucksberg,* we are unwilling to decide the as-applied fundamental rights analysis and accordingly remand those claims to the district court.

## III. CONCLUSION

The Alabama statute making it a criminal offense to commercially distribute sexual devices in the State is rationally related to the State's legitimate government interest in public morality. The district court therefore erred invalidating the statute under rational basis scrutiny. The statute also survives the plaintiffs' facial challenge asserting fundamental constitutional rights. We conclude, however, the plaintiffs' as-applied fundamental rights challenges must be considered further by the district court.

REVERSED AND REMANDED.

## APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

Civil Action No. 98-S-1938-NE

SHERRI WILLIAMS, B.J. BAILEY, *et al.*,

*Plaintiffs*,

v.

BILL PRYOR, in his official capacity as the Attorney General of the State of Alabama,

*Defendant.*

October 10, 2002

## MEMORANDUM OPINION

This case is before the court on remand from the Eleventh Circuit Court of Appeals for further consideration of plaintiffs' as-applied constitutional challenge to an Alabama statute prohibiting the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs." Alabama Code § 13A-12-200.2(a)(1) (1975) (Supp. 2001). *See Williams v. Pryor*, 240 F.3d 944, 955-56 (11th Cir. 2001), *rev'g Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999). For convenience, the prohibited appliances will be referred to in this opinion as "sexual devices."[1] Plaintiffs are either vendors or users of

[1] *See Williams v. Pryor*, 240 F.3d 944, 947 n.1 (11th Cir. 2001) ("We adopt the district court's usage of the shorthand term "sexual device" in place of the cumbersome phrase 'device designed or marketed as useful primarily for the stimulation of the human genital organs.'"); *see also Williams v. Pryor*, 41 F. Supp. 2d 1257, 1259-60 (N.D. Ala. 1999).

such sexual devices. Defendant is William H. Pryor, Jr., the Attorney General for the State of Alabama.

"Vendor" plaintiffs B.J. Bailey and Sherri Williams, and "user" plaintiffs Alice Jean Cope, Jane Doe, Deborah L. Cooper, Benny G. Cooper, Dan Bailey, Jane Poe, and Jane Roe, have moved for summary judgment, and seek a declaration that Alabama Code § 13A-12-200.2(a)(1) is unconstitutional. Defendant also has filed a motion for summary judgment. He argues that plaintiffs lack standing to assert a constitutional challenge and, further, that plaintiffs seek recognition of a right not protected by the Constitution.

When confronted with cross motions for summary judgment, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2720, at 335-36 (1998) (footnote omitted); *see also, e.g.*, *Arnold v. United States Postal Service*, 649 F. Supp. 676, 678 (D. D.C. 1986). Federal Rule of Civil Procedure 56(c) provides, in part, that summary judgment not only is proper, but "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); *see also Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th

Cir. 1991) (en banc). The motion pierces the pleadings, and "strikes at the heart of the claim. In effect it argues that as a matter of law upon admitted or established facts the moving party is entitled to prevail." Charles Alan Wright, *The Law of Federal Courts* § 99, at 705 (5th ed. 1994).

## I. SUMMARY OF DECISION

When a state statute is alleged to burden a fundamental constitutional right, the district court's review of the challenged provision must be strict and exacting. Plaintiffs have submitted a great deal of unrefuted evidence to demonstrate that the Alabama statute at issue contravenes the "user" plaintiffs' fundamental constitutional right to privacy. That evidence has convinced this court that there exists a substantial history, legal tradition, and contemporary practice of deliberate state non-interference in the private, consensual, sexual relationships of married persons and unmarried adults. The ultimate result is that plaintiffs have shown that the fundamental right of privacy, long-recognized by the Supreme Court as inherent among our constitutional protections, incorporates a right to sexual privacy. Plaintiffs also have shown that this Nation's history, tradition, and contemporary treatment of sexual devices themselves evidences that this right of sexual privacy, even in its narrowest form, protects plaintiffs' use of sexual devices like those targeted by Alabama Code § 13A-12-200.2(a)(1). Accordingly, plaintiffs assert that the challenged statute impermissibly infringes their right to sexual privacy, insofar as the statute burdens the user plaintiffs' right to employ sexual devices within their private, adult, consensual, sexual relationships.

The constitutional guarantees that accompany plaintiffs' fundamental right to privacy will not permit the State of Alabama to prohibit plaintiffs from purchasing sexual devices for use within the confines of their private, adult, consensual, sexual relationships, unless the State can

demonstrate that it has a compelling interest to do so, and, that the challenged statutory provision is narrowly tailored to accomplish that objective. Given plaintiffs' overwhelming evidence that the State of Alabama cannot make that showing, the Attorney General's failure to attempt an argument to the contrary, and this court's conclusion that Alabama has not narrowly constructed Alabama Code § 13A-12-200.2(a)(1) to accomplish its objectives, plaintiffs' motion for summary judgment is due to be granted and defendant's denied.

## II. PROCEDURAL HISTORY

The original plaintiffs in this action—Sherri Williams, B.J. Bailey, Betty Faye Haggermaker, Sherry Taylor-Williams, Alice Jean Cope, and Jane Doe—filed their complaint on July 29, 1998, following the Alabama Legislature's enactment of amendments to the "Alabama Anti-Obscenity Enforcement Act" on April 29, 1998. *See* Act No. 98-467, 1998 Acts of Alabama (subsequently codified as Alabama Code §§ 13A-12-200.1 through 13A-12-200.12 (1975) (Supp. 2001)). Those amendments became effective on July 1, 1998, and made it unlawful to sell or otherwise distribute "any device designed or marketed as useful primarily for the stimulation of human genital organs . . . ." Alabama Code § 13A-12-200.2(a)(1). The original plaintiffs were users or vendors of such sexual devices and, pursuant to 42 U.S.C. § 1983, sought injunctive relief from this court, arguing that § 13A-12-200.2—facially and as-applied—burdened and violated their right to privacy and personal autonomy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution.

Plaintiffs initially sought a temporary restraining order to preclude defendant from enforcing the amendments to the State's obscenity statute. The parties subsequently stipulated that "the status quo would be maintained and the amendments not enforced with respect to plaintiffs[],

pending the Court's determination following a hearing on plaintiffs' claims for preliminary injunctive relief."[2] In an order entered on December 9, 1998, however, this court advanced plaintiffs' motion for a preliminary injunction to a final hearing on the merits of their application for declaratory and permanent injunctive relief. This court thus solely considered plaintiffs' motion for permanent injunctive relief, and granted that motion on March 29, 1999, thereby enjoining the Attorney General from enforcing Alabama Code § 13A-12-200.2(a)(1). *See Williams v. Pryor*, 41 F. Supp. 2d 1257, 1293 (N.D. Ala. 1999). The Attorney General appealed and the Eleventh Circuit reversed, remanding the action for further consideration of plaintiffs' as-applied constitutional challenges to the statute. *See Williams v. Pryor*, 240 F.3d 944, 955-56 (11th Cir. 2001). These as-applied challenges are the subject of this court's consideration, *infra*, at Part V.

Following remand, plaintiffs amended their complaint to add five plaintiffs—Deborah L. Cooper, Benny G. Cooper, Dan Bailey, Jane Poe, and Jane Roe—who appear in this action as users of sexual devices proscribed by the challenged statutory provision.

All plaintiffs again request that this court declare Alabama Code § 13A-12-200.2(a)(1) to be unconstitutional, as it is applied to these plaintiffs, and to the extent that it restricts the sale and purchase of sexual devices. Plaintiffs seek permanent injunctive relief barring the Attorney General from enforcing the statute. As grounds for this demand, plaintiffs argue that, by prohibiting the distribution and sale of sexual devices designed to stimulate orgasm, the State of Alabama has

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[2] Plaintiffs' Request for Expedited Scheduling Conference (doc. no. 27) ¶ 2. (All references herein to "doc. no. __" are to the numbers assigned pleadings stamped by the Clerk as "filed.")

> intruded into the most intimate of places—the bedrooms of its citizens—and the lawful sexual conduct that occurs therein. While the statute's reach does not directly proscribe the sexual conduct in question, it places—without justification—a substantial and undue burden on the ability of the plaintiffs to obtain devices regulated by the statute. By restricting sales of these devices to plaintiffs, Alabama has acted in violation of the fundamental rights of privacy and personal autonomy that protect an individual's lawful sexual practices guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.[3]

Plaintiffs also claim that similar constitutional violations have occurred because the State of Alabama has, "[b]y prohibiting the distribution and sale of sexual devices and aids designed to stimulate orgasm, . . . intruded upon the lawful treatment decisions of its citizens to alleviate a common medical condition treatable by use of many of the devices covered by the statute."[4]

The day after filing their amended complaint, plaintiffs filed a motion for summary judgment, which was denied without prejudice, in order to permit the parties to reopen the discovery process.

The Attorney General subsequently moved to dismiss plaintiff Sherry Taylor-Williams from the action for failure to prosecute her individual claims. ("User" plaintiff Sherry Taylor-Williams is not related to "vendor" plaintiff Sherri Williams.) The evidence presented to this court demonstrated that Ms. Taylor-Williams had moved from her previous residence without contacting her attorneys, or

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[3] Amended Complaint (doc. no. 55) ¶ 43, at 13-14.

[4] *Id.* ¶ 44, at 14.

leaving information regarding her new address. Neither plaintiffs' counsel nor defendant could locate Ms. Taylor-Williams, despite numerous attempts to do so. Consequently, the court granted the Attorney General's motion, and dismissed the claims of Ms. Taylor-Williams. Meanwhile, plaintiff Betty Faye Haggermaker and the Attorney General stipulated to the dismissal of Ms. Haggermaker's claims, due to her declining health and unwillingness to proceed. The court accordingly entered an order dismissing Ms. Haggermaker from the action on February 27, 2002.

The remaining plaintiffs renewed their motion for summary judgment on April 12, 2002, asserting that Alabama Code § 13A-12-200.2(a)(1) violates their constitutional right to privacy. The Attorney General filed his own motion for summary judgment on April 15, 2002, arguing that plaintiffs lack standing to bring their constitutional challenge, and cannot claim that the fundamental right to privacy protects the right to distribute or purchase sexual devices.

## III. STATEMENT OF FACTS

Many of the same issues and parties previously considered by this court in the memorandum opinion entered on March 29, 1999 now reappear before the court on the parties' cross-motions for summary judgment. *See Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999). For that reason, the court adopts the statement of facts from its prior opinion where relevant, and briefly reviews those facts here. With the addition of new parties, the dismissal of former parties, and the passage of more than three years, however, this court also undertakes a consideration of the facts and circumstances as they presently stand.

The Alabama Legislature originally enacted an "Anti-Obscenity Enforcement Act" in 1989. *See* Act No. 89-402, 1989 Acts of Alabama, at 791 *et seq.* (subsequently

codified at Alabama Code §§ 13A-12-200.1 through 13A-12-200.10 (1975) (1994 Replacement Vol.)). Nine years later, the Alabama Legislature broadened the scope of that act—which previously had governed solely the distribution of "obscene material"[5]—through enactment of Act No. 98-467 during the 1998 regular session. *See* Act No. 98-467, 1998 Acts of Alabama (subsequently codified as Alabama Code §§ 13A-12-200.1 through 13A-12-200.12 (1975) (Supp. 2001)). The 1998 amendments inserted a proviso that criminalized the distribution of "any device designed or marketed as useful primarily for the stimulation of human

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[5] The terms "obscene," "material," and "distribute" were defined by the original legislation as follows:

> (1) OBSCENE. Such term means that:
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> a. The average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest; and
>
> b. The material depicts or describes, in a patently offensive way, sexual conduct, actual or simulated, normal or perverted; and
>
> c. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> (2) MATERIAL. Any book, magazine, newspaper, printed or written matter, writing, description, picture, drawing, animation, photograph, motion picture, film, video tape, pictorial representation, depiction, image, electrical or electronic reproduction, broadcast, transmission, telephone communication, sound recording, article, device, equipment, matter, oral communication, live performance, or dance.
>
> (3) DISTRIBUTE. To import, export, sell, rent, lend, transfer possession of or title to, display, exhibit, show, present, provide, broadcast, transmit, retransmit, communicate by telephone, play, orally communicate or perform.

Ala. Code §§ 13A-12-200.1 (1975) (1994 Replacement Vol.).

genital organs..." The amended provision reads, in pertinent part, as follows:

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material *or any device designed or marketed as useful primarily for the stimulation of human genital organs* for any thing of pecuniary value. *Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica for the sake of prurient appeal.* Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than *ten thousand dollars ($10,000)* and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. *A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).*

Alabama Code § 13A-12-200.2(a)(1) (Supp. 2001) (emphasis added to 1998 amendments).[6] The statute does

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[6] The remaining sub-sections of § 13A-12-200.2(a) read as follows:

(2) It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than twenty thousand dollars ($20,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

(3) It shall be unlawful for any person to knowingly produce, or offer or agree to produce, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a Class C felony.

(4) If a person is held under this section in the county jail, one-half of any fines collected and due to be deposited to the State General Fund for violations of this section shall be paid by the Comptroller to the general fund of the county where the person is held for the operation of the county jail.

not state, as in the form of examples, which sexual devices are prohibited from distribution.

**A. The Vendor Plaintiffs**

"Vendor" plaintiff Sherri Williams is a Florida resident who owns and operates "Pleasures," an Alabama corporation. The company has two retail outlets in Alabama that sell sexual aids and novelties: one located in Huntsville, and another in Decatur. The Huntsville Pleasures store has been operating since June of 1993, and it is located in a small shopping mall near other retail establishments, including an adult video store, a liquor store, a hair salon, a health spa, an O'Charley's restaurant, and a Wal-Mart Super Center.[7] As of December 3, 1998, the date of the parties' stipulation of facts, the Huntsville store had approximately 14,960 customers annually and, during calendar year 1997, sold approximately 22,440 items, generating gross revenues of approximately $448,837. In 1998, through July 1, the Huntsville store sold approximately 10,060 items and generated gross revenues of approximately $201,314.[8]

The Decatur Pleasures store has been operating since February of 1996, and it also is situated in a small shopping mall in a retail business district, close to other retail establishments, including a Texaco gasoline station, a chiropractor's office, a pet grooming facility, a tanning salon, a printer, a specialty kite shop, and a clothing store catering to women and children.[9] During calendar year 1997, the Decatur Pleasures store had approximately 5,600 customers and sold approximately 8,455 items, generating gross revenues of approximately $169,093. In 1998, through

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Ala. Code § 13A-12-200.2(a)(2) – (a)(4) (Supp. 2001).

[7] Stipulation of Facts (doc. no. 33) ¶ 2.

[8] *Id.* ¶ 12.

[9] *Id.* ¶ 3.

July 1, that store sold approximately 5,170 items and generated gross revenues of approximately $103,438.[10]

The parties have stipulated that the Pleasures stores do not purport to operate as, or resemble, "adult" bookstores, although a limited number of adult-oriented, "soft porn" or "R"-rated videos and magazines are sold.[11] Both stores have signage on the front doors stating: "If offended by explicit sexuality, Please do not enter, You must be 21 years of age."[12] Both stores also have brick storefronts with large display windows that feature lingerie, massage oils, adult games, hosiery, instructional videos, bath powders, aromatherapy candles, romance novels, and similar products.[13] Both stores are strictly retail operations, and do not offer sexual performances or video shows.[14] The products sold at both stores include novelties with an adult theme, and items that are marketed to facilitate sexual relations, such as condoms, lubricants, and vibrators.[15] More specifically, Pleasures promotes an extensive line of lingerie, exotic oils, lotions, lubricants, instructional videos, reading materials, and vibrating and non-vibrating sexual aids, which include vibrators, vibrating and non-vibrating dildos, penis extensions, penis enlargement devices, anal beads, penis rings, creams to prolong erection, artificial vaginas, and inflatable dolls.[16] Each store offers counseling on the use of these products, and also sells cakes, gourmet chocolates, and various types of coffee.[17]

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[10] *Id.* ¶ 13.

[11] *Id.* ¶ 8.

[12] *Id.*

[13] Stipulation of Facts (doc. no. 33) ¶ 4.

[14] *Id.* ¶ 7.

[15] *Id.* ¶ 9.

[16] *Id.* ¶ 10; *see also* Supplementation/Correction of Stipulation of Facts (doc. no. 40), Ex. A (Inventory of Pleasures' Huntsville location).

[17] Stipulation of Facts (doc. no. 33) ¶ 7.

Although neither Sherri Williams nor her agents have been arrested in connection with the operation of Pleasures, Ms. Williams challenges the constitutionality of the statute—on her own behalf and also on behalf of her customers—because she fears arrest and prosecution under Alabama Code § 13A-12-200.2(a)(1) unless she discontinues the sale of sexual devices.[18]

Similarly, vendor plaintiff B.J. Bailey is an Alabama resident who owns and operates "Saucy Lady, Inc.," an Alabama corporation that "conducts in-house 'Tupperware'-style parties at which sexual aids and novelties are displayed and sold."[19] (Plaintiff Dan Bailey, newly added to this action, is B.J. Bailey's husband, and owns 49% of the stock in Saucy Lady, Inc., although Mr. Bailey presents himself in this action as a "user" plaintiff.[20]) Saucy Lady, Inc. has been organizing and conducting such parties throughout Alabama since 1993, although the company was not incorporated until 1995.[21] Sexual paraphernalia, devices, and novelties are sold at the parties, including lubricants, massage oils, books and instruction manuals, adult games, lingerie, vibrating and non-vibrating dildos, products to strengthen or tighten the vagina, products to prolong erection, and anal beads.[22] Mrs. Bailey asserts that at least some of these items may be covered by the statute, thereby subjecting her and her agents to arrest and prosecution.[23] During 1997, approximately 10,500 such products were sold at Saucy Lady parties, generating revenue of approximately $160,000. Through July 1, 1998, the parties were responsible for the sale of

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[18] Amended Complaint (doc. no. 55), ¶ 6.

[19] *Id.* ¶ 7.

[20] Declaration of B.J. Bailey (doc. no. 14), ¶ 2.

[21] Stipulation of Facts (doc. no. 33) ¶ 16.

[22] Supplementation/Correction of Stipulation of Facts (doc. no. 40), Ex. B (Saucy Lady, Inc. order form).

[23] Stipulation of Facts (doc. no. 33) ¶ 21.

approximately 5,250 products, generating revenues of approximately $80,000.[24]

Saucy Lady parties are conducted in the privacy of a host home and are marketed exclusively to adult women. The company does not advertise, and instead relies on word-of-mouth to generate attendance.[25] In 1997, approximately 770 Saucy Lady parties were conducted throughout Alabama (in Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marshall, Morgan, Shelby, and, Walker counties), while approximately 380 parties had been hosted in 1998, as of July 1.[26]

Generally, between three and thirty-five women attend each Saucy Lady party. Total attendance in 1997 was approximately 7,700, while total attendance through July 1, 1998 was approximately 3,800.[27] Saucy Lady customers typically are adult women (married, single, and divorced) from nineteen to seventy years of age, and are of diverse religious, racial, and ethnic backgrounds.[28] The customers also belong to a variety of professions and occupations, and differ extensively in their level of sexual experience and knowledge. Mrs. Bailey asserts that the majority of women who attend her parties have told her that they previously were either anorgasmic,[29] or had experienced extreme difficulty reaching orgasm through sexual intercourse alone. Some of these customers have consulted a physician or therapist about such issues. A significant number of customers allegedly have reported that products purchased at the Saucy Lady parties helped them to become orgasmic, and greatly improved their sexual and marital relations.[30]

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[24] *Id.* ¶ 22.

[25] *Id.* ¶ 17.

[26] *Id.* ¶ 18-19.

[27] *Id.* ¶ 20.

[28] *Id.* ¶ 26.

[29] Anorgasmy is defined as "failure to experience orgasm in coitus." *Dorland's Illustrated Medical Dictionary* 88 (28th ed. 1994).

[30] Stipulation of Facts (doc. no. 33) ¶ 26.

Mrs. Bailey further contends that numerous Saucy Lady customers attend the parties and purchase sexual devices because they prefer to avoid sexual relations with others, due to prior negative relationships, or the risk of sexually transmitted diseases, or other risks associated with developing an intimate relationship. Other attendees state that they are unable to establish a relationship with another person, but still desire to be sexually active. These women often purchase sexual devices in order to pursue personal sexual goals within the privacy of their homes without involving another person as a sexual partner.[31]

As with plaintiff Sherri Williams, there have never been any arrests or threats of prosecution in connection with Saucy Lady parties.[32]

**B. The User Plaintiffs**

"User" plaintiff Alice Jean Cope is an Alabama resident, a customer of Saucy Lady, Inc., and a user of the sexual devices that Alabama Code § 13A-12-200.2(a)(1) seeks to prohibit. Mrs. Cope is a thirty-year-old married woman who uses sexual devices during intimate relations with her husband. Before beginning to use such devices, Mrs. Cope was anorgasmic for approximately ten years, despite being sexually active during that time period.[33] Like the other user plaintiffs in this action, Mrs. Cope has not been arrested or threatened with prosecution for her purchase of sexual devices.

User plaintiff Jane Doe is an Alabama resident, a customer of Saucy Lady, Inc., and a user of sexual devices that the 1998 amendments seek to proscribe. Ms. Doe is a fifty-year-old woman who now is single, but who previously has been married and divorced. Ms. Doe began using sexual

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[31] *Id.* ¶ 27.

[32] *Id.* ¶ 23.

[33] Amended Complaint (doc. no. 55) ¶ 10.

devices on the advice of her therapist, as a means to combat post-partum depression and to improve her marital relationship. Ms. Doe currently uses the devices to avoid sexually transmitted diseases, while remaining sexually active.[34]

User plaintiff Deborah L. Cooper is thirty-three years old, and an Alabama resident. She is married to user plaintiff Benny G. Cooper. The Coopers began using sexual devices in order to repair their deteriorating sexual relationship and marriage. To that end, Mrs. Cooper attended an "adult toy" party at a friend's home, at which she purchased a sexual device that she "subsequently introduced into her marriage."[35] Both Mr. and Mrs. Cooper attribute the use of sexual devices to "restoring . . . trust, dialogue, and understanding in their marriage."[36]

User plaintiff Dan Bailey also is an Alabama resident, and is married to vendor plaintiff B.J. Bailey. Mr. Bailey, who is sixty-one, and fourteen years older than his wife, has suffered in recent years from a respiratory condition and problems with arousal. Mr. Bailey asserts that the use of sexual devices has improved his sexual relationship with his wife.[37]

User plaintiff Jane Poe is a twenty-four year-old Alabama resident who has been married for two years. Ms. Poe contends that her inability to achieve orgasm caused problems in her marriage. After seeking advice from friends and other women facing similar marital problems, Ms. Poe attended an "adult toys" party, and subsequently introduced sexual devices purchased at the party into her marriage. As a result, Ms. Poe avers that she and her husband enjoy a

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[34] *Id.* ¶ 11.
[35] *Id.* ¶ 12.
[36] *Id.*
[37] *Id.* ¶ 14.

tension-free sexual relationship, and are happier as a couple, "both in and out of the bedroom."[38]

Finally, user plaintiff Jane Roe is a thirty-eight year-old Alabama resident who suffers from a chronic disability that makes it extremely painful to engage in sexual intercourse. Ms. Roe has lived with this condition since she was twenty-four, and claims that sex has become increasingly less enjoyable since that time. Ms. Roe asserts, however, that she was invited to an "adult toys" party, at which she was able to discuss her condition with other women in a "private, supportive environment."[39] Ms. Roe purchased sexual devices at this party that allow her to experience sexual pleasure without pain or discomfort. This plaintiff states that, while she hopes to marry or have a consistent sexual partner in the future, any sexual relationship will require her partner to use such a sexual device to enable her to experience sexual pleasure without pain.

All plaintiffs challenge the constitutionality of Alabama Code § 13A-12-200.2(a)(1), as it is applied to them, arguing that

> Alabama has unduly burdened the rights of plaintiffs to be free from unwarranted governmental intrusions into their private practices—practices which have not been made unlawful in Alabama. Neither masturbation nor stimulation of the genitalia by a sexual device is a crime in Alabama. Indeed, many of the devices covered by the statute are the recommended treatment choice by therapists treating sexual dysfunction. The constitutional right of privacy established in a long line of United States Supreme Court

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[38] *Id.* ¶ 15.

[39] Amended Complaint (doc. no. 55) ¶ 16.

> decisions forbid[s] this type of intrusion into an individual's lawful sexual practices and intimate medical affairs.[40]

Plaintiffs emphasize that purchasers of sexual devices have "a wide variety of therapeutic needs,"[41] and that such devices also are purchased by persons seeking to avoid sexually transmitted diseases, or who are unable or unwilling to marry, or to enter into a sexual relationship with another person.[42]

The Attorney General has stipulated to all of these facts. Even so, he responds in his motion for summary judgment that this court does not possess subject matter jurisdiction, as both the user and vendor plaintiffs allegedly are without standing to pursue their claims. Attorney General Pryor also argues that the constitutional right to privacy relied on by plaintiffs cannot be expanded to include a fundamental right of plaintiffs to sell or purchase sexual devices. These arguments are considered in greater detail below.

## IV. STANDING

In order to determine whether a "specific person is the proper party to bring a matter to the court for adjudication," a plaintiff must demonstrate each of the elements of the tripartite standard that the Supreme Court has characterized as an "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 531 (1992).

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected

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[40] *Id.* ¶ 22.
[41] *Id.* ¶¶ 23, 30.
[42] *See id.* ¶¶ 32-33.

> interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560-61, 112 S. Ct. at 2136 (citations, internal quotation marks, and bracketed alterations omitted). Only the first of these three elements is disputed by the Attorney General: he contends that none of the plaintiffs can demonstrate that she or he has experienced an "injury in fact."

This court briefly considered plaintiffs' standing to bring this action in the memorandum opinion entered on March 29, 1999:

> The Attorney General challenges the vendor plaintiffs' ability to assert a challenge to Alabama Act No. 98-467 on behalf of their customers: that is, of unnamed users of the proscribed devices. Clarifying this position at oral argument, the Assistant Attorney General representing defendant said: "[w]e think the sellers can have standing as sellers of the products but not on behalf of the users, . . . *given the fact that users are here*" (emphasis supplied).
>
> As an initial matter, this court finds that the vendor plaintiffs independently satisfy standing requirements. *See Craig v. Boren*,

> 429 U.S. 190, 194, 97 S. Ct. 451, 455, 50 L. Ed. 2d 397 (1976). Furthermore, this court agrees with the Attorney General's implicit concession that the user plaintiffs have standing to assert a due process challenge. *Cf. Carey v. Population Services International*, 431 U.S. 678, 683-84, 97 S. Ct. 2010, 2015, 52 L. Ed. 2d 675 (1977). As a consequence, it is not necessary to decide the standing of the vendor plaintiffs to act as advocates for the rights of unnamed users of the proscribed devices. *See id.* at 682, 97 S. Ct. at 2014. The Article III "case or controversy" requirement has been satisfied for the challenges to the legislation presented in this action.

*Williams*, 41 F. Supp. 2d at 1273-74. The Eleventh Circuit did not consider plaintiffs' standing on appeal of that decision. *See Williams*, 240 F.3d at 944. The Attorney General argues in his present motion for summary judgment, however, that because "the complexion of this litigation has . . . changed since 1999," issues regarding plaintiffs' standing to sue require further consideration.[43] This court agrees.

**A. Standing of the User Plaintiffs**

Attorney General Pryor contends that, "[b]ecause any vendor who sells a sexual device to the user plaintiffs has a statutory affirmative defense that shields them from a successful prosecution, there is no real legal impediment to the plaintiffs purchasing sexual devices in Alabama."[44] Specifically, he refers to Alabama Code § 13A-12-200.4, which provides that "[i]t shall be an affirmative defense to a

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[43] Defendant's Memorandum of Law (doc. no. 78), at 3.

[44] *Id.* at 4.

charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." Alabama Code § 13A-12-200.4 (1975) (1994 Replacement Vol.). This affirmative defense provision was part of the original obscenity legislation enacted in 1989, and was not affected by the state legislature's 1998 amendments. The section of Alabama's obscenity law challenged by all plaintiffs, § 13A-12-200.2(a)(1), is specifically included in this affirmative defense provision. Consequently, the Attorney General argues, "the affirmative defense undeniably applies."[45] The affirmative defense provision embodied in § 13A-12-200.4, according to the Attorney General, would protect sales by vendors to these user plaintiffs because the vendors "would come within the 'safe harbor' set forth [in] section 13A-12-200.4 such that they could never be successfully prosecuted for an alleged violation of section 13A-12-200.2."[46] The Attorney General's reliance on the affirmative defense provision stems from the fact that, "[i]n the depositions and declarations filed in this case, it is made plain that each of the user plaintiffs have a bona fide [medical or psychological] need for sexual devices such that a vendor could sell to them without incurring criminal liability."[47]

Attorney General Pryor thus asserts that plaintiffs have failed to demonstrate that they have been or will be

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 4-5. The Attorney General concedes that user plaintiffs who claim psychological need for these devices cannot rely specifically on the language of the affirmative defense provision, which refers only to a defense for "bona fide medical, scientific, educational, legislative, judicial, or law enforcement" purposes. Ala. Code § 13A-12-200.4. The Attorney General goes to great lengths to demonstrate that psychology is a scientific field of study, but does not offer any evidence that this affirmative defense was intended to, or does, govern psychological needs of the kind exhibited by some of the user plaintiffs. *See* Memorandum of Law (doc. no. 78), at 4-5 & n.2.

prosecuted, or threatened with arrest or prosecution, for purchasing sexual devices of the type governed by Alabama Code § 13A-12-200.2.[48] The affirmative defense of § 13A-12-200.4 leads the Attorney General to contend that the user plaintiffs cannot demonstrate that an Article III case or controversy exists, because the user plaintiffs cannot produce evidence that they have suffered, or will suffer, an injury by the challenged statute.[49] *See Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. He argues that "plaintiffs have shown nothing more than an imaginary or speculative fear of prosecution to support their assertion of standing."[50] Finally, the Attorney General contends that, because the challenged statutory provision targets solely distributors, the user plaintiffs "could not be prosecuted at all for their mere use and possession of sexual devices."[51]

The Supreme Court has held that, for a plaintiff to contest the constitutionality of a criminal statute, "'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1216, 39 L. Ed. 2d 505 (1974)). Further, "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt*, 442 U.S. at 298, 99 S. Ct. at 2309 (quoting *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745, 35 L. Ed. 2d 201 (1979)). On the other

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[48] Defendant's Supplemental Brief (doc. no. 92), at 1.

[49] *Id.* at 2.

[50] *Id.* at 4.

[51] *Id.*

hand, it also has been said that, when a plaintiff fails to claim that he or she has "'ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,'" that plaintiff lacks standing to challenge the offending statute. *Babbitt*, 442 U.S. at 298-99, 99 S. Ct. at 2309 (quoting *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 749, 27 L. Ed. 2d 669 (1971)).

The gravamen of the standing inquiry concerning the user plaintiffs, then, would seem to be solely whether these plaintiffs can show that they have "ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible" for violation of Alabama Code § 13A-12-200.2(a)(1). *Id.* Given that this statutory provision targets solely distributors of sexual devices, the immediate impulse is to answer this question in the negative.

In response, the user plaintiffs direct this court's attention to a body of Supreme Court precedent that, they claim, permits them to maintain their constitutional challenge. *See Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d. 201 (1973). According to plaintiffs, the "common denominator in all these cases is that the statute at issue sought to choke off or constrict the supply of information, services, or products by imposing criminal sanctions on those who provide them."[52]

For example, in *Roe v. Wade*, plaintiff Jane Roe was unable to obtain an abortion in Texas due to a state statute that made it illegal for physicians to perform an abortion unless the mother's life was endangered. The court immediately acknowledged Ms. Roe's standing to challenge

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[52] Plaintiffs' Memorandum in Support of Standing (doc. no. 93), at 9.

the constitutionality of the statute, although she was not a provider of such services and thus not targeted by the statute's language: "[T]here can be little dispute that [Ms. Roe] presented a case or controversy and that, wholly apart from the class aspects, she, *as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes*." 410 U.S. at 124, 93 S. Ct. at 712 (emphasis supplied).

Similarly, in *Doe v. Bolton*, decided the same day as *Roe*, the Supreme Court considered a plaintiff's constitutional challenge to a Georgia statute that prohibited physicians from performing abortions unless the mother's life was endangered, or the pregnancy resulted from rape, or the fetus was likely to be born with a serious defect. The plaintiff there failed to meet any of these criteria, and sued when she was denied an abortion. Under the same rationale relied on in *Roe*, the *Doe* Court determined that the plaintiff had standing to challenge the statute's constitutionality, although the criminal provisions of the statute were directed at providers of abortions (distributors), rather than those who sought the services of the providers (consumers). 410 U.S. at 187, 93 S. Ct. at 745.

Once again, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, consumers of prescription drugs were permitted to bring a constitutional challenge to a Virginia criminal statute that prohibited pharmacists from advertising drug prices. The consumers were held to possess standing to challenge the statute, although they were not targeted for criminal prosecution by the legislative language, because they were able to demonstrate that they would benefit from the drug pricing information, and that the statute thus infringed First Amendment free speech guarantees. 425 U.S. at 755, 757, 96 S. Ct. at 1822, 1823.

Finally, in *Washington v. Glucksberg*, the Court permitted terminally-ill patients who desired to commit suicide while assisted by a physician to challenge the constitutionality of a Washington criminal statute that

prohibited a physician from aiding a person to commit suicide. 521 U.S. at 707, 96 S. Ct. at 2261.

Given these decisions, and their factual similarity to the present case, in which *consumer* plaintiffs challenge a state criminal statute targeting *distributors* of sexual devices, the court concludes that the user plaintiffs have demonstrated independent standing to challenge the contested statute. Further, the decisions reviewed above implicitly recognized those plaintiffs' standing, although none was prosecuted or threatened with prosecution under the state criminal statute at issue. Consequently, the user plaintiffs' contention that enforcement of Alabama Code § 13A-12-200.2(a)(1) unconstitutionally burdens their access to sexual devices is sufficient to satisfy Article III standing requirements.

**B. Standing of the Vendor Plaintiffs**

The Attorney General contends that vendor plaintiffs Sherri Williams and B.J. Bailey do not have standing to sue, because they cannot demonstrate that they have suffered injury, pursuant to *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. The Attorney General asserts that this is because "any vendor who sells a sexual device to the user plaintiffs has a statutory affirmative defense that shields them from a successful prosecution . . . ."[53] Plaintiffs respond that the vendor plaintiffs have independent standing to bring suit. Additionally, they assert that there is a fundamental "problem" with defendant's affirmative defense argument, because

> enforcement of the statute is left to the discretion of local law enforcement officials who can close a business down, seize the stock and place the owner and employees in

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[53] Defendant's Memorandum in Support (doc. no. 78), at 4 (heading).

> jail pending trial. Moreover, there is no assurance that this defense will be successful. It ultimately lies with the trier of fact in a criminal proceeding. The Defendant has offered nothing to show that prosecutors across the state would uniformly interpret the statute to allow the sale of sexual devices under the circumstances involving the plaintiffs in this case. Nor can [the Attorney General] demonstrate[] that jurors would uniformly come to the same conclusion. It is this very uncertainty over how the law will be enforced that makes it impossible for the vendors to continue to operate their business. The record shows that retailers would shut down rather than risk prosecution and jail time.[54]

A search of reported cases failed to uncover any decision applying the affirmative defense embodied in Alabama Code § 13A-12-200.4.

Plaintiffs assert further that the vendor plaintiffs also possess standing to sue on behalf of those "individuals who use sexual devices and are not before this court,"[55] because

> [p]laintiffs Sherri Williams and B.J. Bailey[] each sell the type of products that come within the coverage of the statute. They allege third party standing to bring the challenge on behalf of the past, present and future customers whose privacy rights would be burdened by the enforcement of the statute.[56]

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[54] Plaintiffs' Memorandum in Opposition (doc. no. 88), at 14-15.

[55] *Id.* at 13.

[56] *Id.*

This court concludes that the vendor plaintiffs have standing to pursue this action in their own right, and, on behalf of their potential customers. *See Carey v. Population Services International*, 431 U.S. 678, 683, 97 S. Ct. 2010, 2015, 52 L. Ed. 2d 675 (1977) (holding that corporation engaging in mail-order retail sale of non-medical contraceptive devices had standing to challenge New York statute prohibiting distribution of contraceptives in its own right and on behalf of its customers). The vendor plaintiffs satisfy Article III standing requirements because Alabama Code § 13A-12-200.2(a)(1) operates to inflict an injury on these vendor plaintiffs "sufficient to guarantee [their] 'concrete adverseness.'" *Craig v. Boren*, 429 U.S. 190, 194, 97 S. Ct. 451, 455, 50 L. Ed. 2d 397 (1976) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962)).

In *Craig*, the Supreme Court considered a constitutional challenge by a licensed beer vendor to an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of twenty-one, and to females under the age of eighteen. 429 U.S. at 194, 97 S. Ct. at 455. The Court concluded that the vendor there had standing, both to challenge the statute independently and to bring an equal protection challenge on behalf of males between the ages of eighteen and twenty, because:

> The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. *She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyer's market, or to disobey the statutory command and suffer . . . sanctions and perhaps loss of license. . . .*

> As a vendor with standing to challenge the lawfulness of [the Oklahoma statutory provisions at issue in *Craig*], appellant is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S. Ct. 1678, 1679, 14 L. Ed. 2d 510 (1965) . . . . Otherwise, the threatened imposition of governmental sanctions might deter appellant Whitener and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that "enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975). *Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function. See, e. g., Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Sullivan v. Little Hunting Park,* [396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969)]; *Barrows v. Jackson,*[346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953)].

*Craig*, 429 U.S. at 195, 97 S. Ct. at 455-56 (emphasis supplied) (some citations and internal quotation marks omitted).

The *Craig* Court relied on *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), in arriving at this conclusion. In both *Craig* and *Eisenstadt*, "a state statute . . . imposed legal duties and disabilities upon

the claimant." *Craig*, 429 U.S. at 196, 97 S. Ct. at 456. While the claimant in *Eisenstadt* actually had been convicted of distributing contraceptive foam, in the case before this court—as in the case confronting the *Craig* Court—there has been no arrest, prosecution, or conviction under Alabama Code § 13A-12-200.2(a)(1). The *Craig* Court nevertheless made it plain that the rationale of *Eisenstadt* applied when finding that the vendor plaintiff there had standing to bring a constitutional challenge:

> Since the statute was directed at Baird and penalized his conduct, the [*Eisenstadt*] Court did not hesitate . . . to conclude that the "case or controversy" requirement of Art. III was satisfied. *In considering Baird's constitutional objections, the* [*Eisenstadt*] *Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit* jus tertii[57] *standing was the recognition of "the impact of the litigation on third-party interests.*" Just as the defeat of Baird's suit and the "[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives," . . . so too the failure of Whitener [the vendor plaintiff in *Craig*] to prevail in this suit and the continued enforcement of [the Oklahoma 3.2% beer statute] will "materially impair the ability of" males 18-20 years of age to purchase 3.2%

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[57] *Jus tertii* is a Latin phrase meaning "the right of a third party." *See Black's Law Dictionary* 868 (7th ed. 1999). As Bryan Garner has elsewhere observed, however, the phrase "generally is not a useful enough LATINISM to justify its presence in legal prose." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 493 (2d ed. 1995). Indeed, it obfuscates, rather than clarifies, the author's meaning.

> beer despite their classification by an overt gender-based criterion.

*Craig*, 429 U.S. at 196, 97 S. Ct. at 456 (emphasis supplied) (citations and footnote omitted). In the omitted footnote, the *Craig* Court added these helpful observations:

> The fact that Baird chose to disobey the legal duty imposed upon him by the Massachusetts anticontraception statute, *resulting in his criminal conviction, does not distinguish the standing inquiry from that pertaining to the anticipatory attack in this case. In both* Eisenstadt *and here, the challenged statutes compel* jus tertii [read "third party"] *claimants either to cease their proscribed activities or to suffer appropriate sanctions. The existence of Art. III "injury in fact" and the structure of the claimant's relationship to third parties are not altered by the litigative posture of the suit. And, certainly, no suggestion will be heard that Whitener's* [the vendor plaintiff's] *anticipatory challenge offends the normal requirements governing such actions. . . .*

*Id.* at 196 n.5, 97 S. Ct. at 456 n.5 (emphasis supplied) (citations omitted).

In like manner, the vendor plaintiffs before this court are "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of [their] buyer's market, or to disobey the statutory command and suffer . . . sanctions." *Craig*, 429 U.S. at 194, 97 S. Ct. at 455-56. Indeed, the vendor plaintiffs complain that they have lost business since the challenged statutory provision was adopted.[58] These vendor

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[58] Plaintiffs' Memorandum in Opposition (doc. no. 88), at 15.

plaintiffs also have standing to "resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* Accordingly, vendor plaintiffs Sherri Williams and B.J. Bailey have demonstrated that they have standing to pursue their constitutional challenge against defendant—both independently and on behalf of third party purchasers of sexual devices.

## V. FUNDAMENTAL RIGHTS ANALYSIS AND PLAINTIFFS' AS-APPLIED CHALLENGES

Plaintiffs initially brought facial and as-applied challenges to the 1998 amendments to Alabama Code § 13A-12-200.2(a)(1). This court rejected plaintiffs' facial challenge to the statute in the memorandum opinion entered on March 29, 1999, a holding that was affirmed by the Eleventh Circuit on appeal. *See Williams*, 240 F.3d at 953. Even so, the appellate court remanded the case for further consideration of plaintiffs' as-applied challenges. *See id.* at 955. Specifically, the Eleventh Circuit instructed:

> *Although the statute is not facially unconstitutional* because . . . it may constitutionally be applied to those who sell to minors sexual devices which are deemed harmful to minors, *the as-applied challenges raised by the plaintiffs, married or unmarried, implicate different and important interests in sexual privacy*. *See Griswold*, 381 U.S. at 485-86, 85 S. Ct. at 1682 ("Would we allow the police to search the sacred precincts of marital bedrooms? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); *Glucksberg*, 521 U.S. at 720, 117 S. Ct. at 2267 (citing *Griswold* as holding the Constitution protects a

fundamental right "to marital privacy"); *see also Casey*, 505 U.S. at 898, 112 S. Ct. at 2831 (invalidating provision requiring notification of married woman's spouse before abortion could be performed because "[w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family"); *Eisenstadt*, 405 U.S. at 453, 92 S. Ct. at 1033 ("[T]he rights of the individual to [have] access to contraceptives . . . must be the same for the unmarried and married alike."); *Bowers v. Hardwick*, 478 U.S. 186, 209 n. 4, 106 S. Ct. 2841, 2853 n. 1, 92 L. Ed. 2d 140 (1986) (Blackmun, J., dissenting) (questioning validity of categorizations of sexual activity depending on marital status); *id.* at 216, 106 S. Ct. at 2857 (Stevens, J., dissenting) (citing *Eisenstadt* and *Carey* as holding that fundamental rights protection in sexual matters "extends to intimate choices by unmarried as well as married persons").

*We remand the as-applied challenges for due consideration by the district court because the record and stipulations in this case simply are too narrow to permit us to decide whether or to what extent the Alabama statute infringes a fundamental right to sexual privacy of the specific plaintiffs in this case.* In *Glucksberg*, its most recent case in which an argument for recognition of a new fundamental right was presented, the Supreme Court instructed that a

> fundamental right must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right] were sacrificed." 521 U.S. at 720-21, 117 S. Ct. at 2268 (citations and quotations omitted). In concluding the Constitution did not include such a fundamental right of physician-assisted suicide, the Court discussed at length not only the long history of the proscription of suicide and assisting suicide but also the considerable contemporary nationwide legislative action to preserve such laws. *See id.* at 710-19, 117 S. Ct. at 2262-67. By contrast, in this case the district court considered in two paragraphs only whether the "use of sexual devices" is a deeply rooted and central liberty. *See* 41 F. Supp. 2d at 1283-84 & n. 33. *The court analyzed neither whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines any such history.* The record is bare of evidence on these important questions. *Absent the kind of careful consideration the Supreme Court performed in Glucksberg*, we are unwilling to decide the as-applied fundamental rights analysis and accordingly remand those claims to the district court.

*Williams*, 240 F.3d at 955-56 (emphasis supplied). Accordingly, plaintiffs' as-applied challenges are the subject of the parties' cross-motions for summary judgment.

As the excerpted language from the *Williams* opinion evidences, the Eleventh Circuit relied in significant part on

*Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), to arrive at its holding. In *Glucksberg*, the Supreme Court considered a due process challenge to the State of Washington's ban on assisted suicide by a group of practicing physicians, three gravely ill patients considering physician-assisted suicide, and a nonprofit organization. The Supreme Court emphasized its long-standing reluctance to expand the "concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 720, 117 S. Ct. at 2267 (internal quotation marks omitted) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992)).

In the interest of exercising "utmost care" to avoid unprincipled decisionmaking, federal courts employ a two-part substantive due process analysis to determine whether constitutional protection should be extended to an asserted right. *Id.* at 720, 117 S. Ct. at 2268. The first feature of this test requires a plaintiff to demonstrate that the fundamental right alleged is,

> objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 1938, 52 L. Ed. 2d 531 (1977) (plurality opinion)]; *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L.Ed 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937).

*Glucksberg*, 521 U.S. at 720-21, 117 S. Ct. at 2268. The second part of the substantive due process test requires that

this court carefully describe the fundamental liberty interest at issue. *See id.* at 720, 117 S. Ct. at 2268 (collecting cases).

This court now turns to the first part of the substantive due process test—namely, whether the fundamental right alleged is deeply rooted in this Nation's history and tradition. The *Glucksberg* Court began its analysis, as the Supreme Court "do[es] in all due process cases, by examining our Nation's history, legal traditions, and practices." *Id.* at 710, 117 S. Ct. at 2262. To that end, the Court looked to more than 700 years of Anglo-American common-law tradition, including the legislation of the American colonies. Significantly, *Glucksberg* extended this analysis to include a review of the contemporary practices and attitudes regarding assisted suicide: specifically, the Court looked to current statutes and those of "recent years," "public concern," "democratic action," and twentieth century model legislation and its effect on state legislation. *Glucksberg*, 521 U.S. at 715-16, 117 S. Ct. at 2265-66; *see also Williams*, 240 F.3d at 955 (instructing this court to conduct a review of "contemporary practice" in light of *Glucksberg*'s similar analysis). The Court accordingly considered current statutes, legislative debates, voter initiatives, and the positions of contemporary task forces and commissions on the issue of assisted suicide. The *Glucksberg* Court ultimately held that the Washington ban on assisted suicide did not violate the Fourteenth Amendment, either facially or as-applied, because there was no history, tradition, or contemporary practice of permitting persons to commit, or assist in the commission of, suicide. *See* 521 U.S. at 719, 734, 117 S. Ct. at 2267, 2275; *see also Williams*, 240 F.3d at 955 (citing *Glucksberg*'s discussion of the "long history of the proscription of suicide and assisting suicide" and the "considerable contemporary nationwide legislative action to preserve such laws").

Applying that mode of analysis here, plaintiffs contend that this country's history and legal tradition reflect that states have intentionally refrained from interfering in the

private, consensual, sexual relations of married persons. According to plaintiffs, "[a] survey of the regulation of adult consensual sexual activity in the United States from Colonial times to present does not support state interference with lawful, private sexual conduct when engaged in by individuals married to each other."[59] Historically, "most legislation in this area is directed at sexual conduct which occurs *outside the marital chamber* (i.e. fornication and adultery)."[60] This historical, legislative focus on extra-marital sexual relationships has changed in the modern era, according to plaintiffs, because the "sexual revolution" that occurred in the United States during the nineteenth and twentieth centuries "resulted in changing attitudes about state interference with adult consensual activity—regardless of marital status."[61] These facts lead plaintiffs to declare that there is a deeply rooted history of state non-interference in the private, consensual, sexual activity of married persons, and, that contemporary practice has extended that state non-interference to include the private, consensual, sexual activity of unmarried adults. This history, legal tradition, and contemporary practice will be examined in greater detail, below.

The Attorney General concedes that "there is no genuine dispute as to the historical chronology set forth by the plaintiffs' experts," to the effect that there is a "history or tradition of state non-interference in persons sex lives."[62] The Attorney General further admits that, "[t]aken as a whole, it is incontestable that society's attitudes about sex in

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[59] Plaintiffs' Memorandum in Support (doc. no. 58), at 16.

[60] *Id.* (emphasis supplied). Fornication is defined as "[v]oluntary sexual intercourse between two unmarried persons." *Black's Law Dictionary* 664 (7th ed. 1999); *see also The Merriam-Webster Dictionary* 301 (1997) (defining the same term as "consensual sexual intercourse between two persons not married to each other.").

[61] Plaintiffs' Memorandum in Support (doc. no. 58), at 17.

[62] Defendant's Memorandum in Support (doc. no. 78), at 12 (internal quotation marks omitted).

general have become increasingly liberal, especially across the last several decades."[63] General Pryor argues, nevertheless, that "section 13A-12-200.2's general prohibition on the sale of sexual devices [is] misdefined as a bullish invasion of the marital bedroom. . . . The statute itself makes no direct demands on what couples (or individuals) may or may not do when secreted in their bedrooms."[64]

The second part of the substantive due process test requires that this court carefully describe the fundamental liberty interest at issue. *See Glucksberg*, 521 U.S. at 720, 117 S. Ct. at 2268 (collecting cases). The Attorney General would have this court cast the fundamental right alleged herein as one to "purchase dildos and vibrators."[65] In fact, however, the Eleventh Circuit in *Williams v. Pryor* properly and more broadly characterized the liberty interest at issue as "a fundamental right to *sexual privacy* of the specific plaintiffs in this case." 240 F.3d at 955 (emphasis supplied).[66] While the conflict in this case does concern plaintiffs' right to use sexual devices when engaging in lawful, private, consensual, sexual activity, plaintiffs correctly observe that the "major problem with the Defendant's formulation of the issue is the misplaced

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[63] *Id.*

[64] *Id.* at 10.

[65] *Id.*

[66] The Attorney General demands that this court ignore the binding decision of the Eleventh Circuit in *Williams v. Pryor*, because he disagrees with the extent to which the appellate court applied *Glucksberg* to the case at bar. *See* Defendant's Memorandum in Support (doc. no. 78), at 11-12. The Attorney General objects specifically to the breadth of the analysis ordered by the appellate court of plaintiffs' as-applied challenges, calling the analysis "somewhat of an unwarranted amplification of *Glucksberg*." *Id.* at 11. Even were this court in a position to evade the instructions of the appellate court—which it is not—this court agrees with the Eleventh Circuit's interpretation of *Glucksberg*, and its application to plaintiffs' constitutional challenges. *See Williams*, 240 F.3d at 955-56.

emphasis on the sale or purchase of sexual devices, rather than the important constitutional interests at stake . . . ."[67]

In light of *Glucksberg* and the two-part substantive due process test outlined above, plaintiffs must demonstrate that the fundamental right to privacy recognized by the Supreme Court incorporates a fundamental right to *sexual privacy* between married persons and between unmarried persons which, in turn, "encompasses a right to use sexual devices." *Williams*, 240 F.3d at 954 (emphasis supplied). This court will recognize a fundamental right to *sexual privacy* if plaintiffs' evidence of our national history, legal traditions, and contemporary practices establishes that such right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 710, 720-21, 117 S. Ct. at 2262, 2268. What follows, then, is an exploration, based on the evidence submitted by the parties, of American history, legal tradition, and contemporary practices regarding the "private sexual activity of married or unmarried persons." *Williams*, 240 F.3d at 955-56.

Before engaging in that exploration, however, the court notes that it is extremely significant, if not dispositive, that the Attorney General concedes that "there is little evidence to show that sexual devices, or consensual sexual activities in general, have historically been subject to governmental regulation,"[68] and that "it is evident that states have historically exerted little effort in interfering with persons' private, consensual sexual activities."[69] The Attorney General's concession seems to answer the Rule 56 inquiry, and signify that there is no genuine issue of material fact for this court to consider on the question of whether this Nation's history, legal tradition, and contemporary practice evinces a fundamental right to sexual privacy between

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[67] Plaintiffs' Memorandum in Opposition (doc. no. 88), at 15.

[68] Defendant's Memorandum in Support (doc. no. 78), at 16 (heading) (boldface emphasis deleted).

[69] *Id.*

*married or unmarried* persons, grounded in state non-interference in the sexual relationships of married and unmarried people. This court nevertheless examines the evidence put forth by the parties, in the manner of *Glucksberg*, in further consideration of plaintiffs' claim that they have a fundamental constitutional right to sexual privacy, which encompasses a right to use sexual devices, and that such right is impermissibly infringed by Alabama Code § 13A-12-200.2(a)(1).

### A. History and Legal Tradition Regarding Sexual Privacy Between Married Persons

As stated above, plaintiffs cannot claim that Alabama Code § 13A-12-200.2(a)(1) impermissibly infringes their fundamental right to *sexual privacy* unless the evidence submitted by the parties substantiates that such right is "deeply rooted in the Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21, 117 S. Ct. at 2268 (internal quotation marks omitted). The court may also consider evidence of contemporary practices in determining the existence of that right. *See id.* at 710, 117 S. Ct. at 2262. Plaintiffs have offered the following undisputed evidence in that vein, in order to authenticate the existence of a fundamental right of sexual privacy that encompasses plaintiffs' right to use sexual devices.

#### 1. Seventeenth Century – The Colonial Period

This court's review of plaintiffs' undisputed evidence begins with colonial America. Historian and philosopher Michel Foucault writes that the beginning of the seventeenth century was typified by a "certain frankness."[70]

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[70] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 15 (1 Michel Foucault, *The History of Sexuality* (1990)), at 3 (hereinafter *The History of Sexuality*).

> Sexual practices had little need of secrecy; words were said without undue reticence, and things were done without too much concealment; one had a tolerant familiarity with the illicit. . . . It was a time of direct gestures, shameless discourse, and open transgressions, when anatomies were shown and intermingled at will, and knowing children hung about amid the laughter of adults: it was a period when bodies "made a display of themselves."[71]

Foucault states, however, that the "advent of the age of repression" occurred in the seventeenth century, "after hundreds of years of open spaces and free expression . . . ."[72] Plaintiffs offer evidence to show that church and state law became largely synonymous during this repressive period.[73] Protestantism predominated in the governments of the American colonies, which led to increased secular control over sexual conduct.[74] A "strict puritanical code governed society in many of the states that drew no distinction between secular and sectarian laws. Strict laws were adopted prohibiting premarital, extramarital and 'deviant' sexual behavior."[75] Even so, and despite popular opinion, seventeenth and eighteenth century Puritan clergy and congregations typically did not frown on marriage, but instead believed that "sexual intercourse was a human

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[71] *Id.*

[72] *Id.* at 5.

[73] *See, e.g., id.*, Ex. 36 (William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (1975)), at 4 (hereinafter *Americanization of the Common Law*).

[74] *See* Plaintiff's original motion for summary judgment (doc. no. 56), Ex. J (Declaration of Vern L. Bullough), ¶ 15.

[75] *Id.* ¶ 27.

necessity and marriage the only proper supply for it."[76] Further, "[m]arriage and childbearing . . . were encouraged."[77]

Sexual intercourse *outside* a marital relationship was deemed forbidden by God, however, and, consequently, also was proscribed by many colonial communities.[78] "In almost all the colonies a rather strict code was in place that severely punished sexual transgressions occurring outside the marital chamber."[79] One legal historian writes that "the primary objective of criminal law in the pre-revolutionary period was to give legal effect to the community's sense of sin and to punish those who breached the community's taboos."[80] To that end, colonial America "scrupulously enforced" laws banning adultery, sodomy (both punished as capital crimes), and fornication (violators were whipped and forced to marry).[81] These crimes were deemed to "threaten[] the centrality of marital, reproductive sexuality."[82] Plaintiffs' evidence reflects that in Massachusetts, for example,

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[76] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 34 (Edmund Morgan, *The Puritans and Sex*, 15 New. Eng. Q. 591 (1942)), at 593 (hereinafter *The Puritans and Sex*). Morgan cites one case, for example, in which a male plaintiff complained of slander after it was reported that he had broken his deceased wife's heart with grief because he had refused to approach her physically for a period of about three weeks.

[77] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 27.

[78] *See* Plaintiffs' appendix of authorities (doc. no. 57), Ex. 34 (*The Puritans and Sex*), at 607.

[79] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶ 3.

[80] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 36 (*Americanization of the Common Law*), at 37.

[81] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 27.

[82] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 12 (John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (1988)), at 32 (hereinafter *Intimate Matters: A History of Sexuality in America*).

seventeenth century criminal statutes prohibited adultery, bestiality, sodomy, and rape, and punished or made each punishable by death.[83] More than thirty-eight percent of all criminal prosecutions in Massachusetts between 1760 and 1774 were for sexual offenses, and more than ninety-five percent of those were for fornication.[84] Connecticut's colonial laws also prohibited sodomy, bestiality, adultery, and rape (punishing each as capital crimes), and printed the biblical passage that provided justification for these proscriptions alongside the law itself.[85] Connecticut colonialists were punished for acts of fornication by being compelled to marry or suffer other court-ordered penalties.[86]

Plaintiffs contend, without dispute from the Attorney General, that, "even in those places where [deviate, extra-marital] sexual relations were closely regulated by the church/state apparatus, the state did not interfere in private,

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[83] *See id.*, Ex. 9 (*The Colonial Laws of Massachusetts* (Wm. H. Whitmore ed., 1887)), at 14-15.

[84] *See id.*, Ex. 36 (*Americanization of the Common Law*), at 37.

[85] *See id.*, Ex. 6 (*The Blue Laws of New Haven Colony* (1838)), at 103, 124.

[86] *Id.* Plaintiffs state that the church's influence over state law appears to have been less significant in those areas in which demographics did not readily permit marriage. Plaintiffs offer as an example the Chesapeake region, in which the ratio of men to women was four to one. Even so,

> [i]n the Chesapeake, as in New England, church and court prosecuted sinners, levying fines on or whipping those who fornicated, committed adultery, sodomy, or rape, or bore bastards. But New Englanders monitored sexual crimes more extensively and more systematically than did residents of the southern colonies. A racially and socially homogenous population, common religious values, and the geographical proximity of the New England towns facilitated the social control of personal behavior.

Plaintiffs' appendix of authorities (doc. no. 57), Ex. 12 (*Intimate Matters: A History of Sexuality in America*), at 11.

marital sexual relations."[87] Instead, "Protestantism distinguished more clearly between proper sexual expression—that which led to reproduction—and sexual transgression—acts that occurred outside of marriage and for purposes other than reproduction."[88] Plaintiffs also state that a review of statistics reported by historian William E. Nelson "do[es] not indicate a single prosecution of married people for sexual activity within the marital relationship."[89] Plaintiffs emphasize, for example, that so reluctant was the state to intrude upon the sexual relationship of married people, that both the English common law and American colonial laws regarded marriage as a complete defense to rape.[90] As historian, author, and university professor Dr. Vern L. Bullough states:

> While there have always been laws against sodomy and rape, if such activities took place in the marital bedroom prosecutions were almost non-existent. Virtually every state throughout the history of this country had a marital rape exception. Even today, when marital rape can be subject to prosecution in some states, so strong is the tradition and value of privacy in the marital chamber, that prosecutors have been extremely reluctant to bring charges of such conduct. Cases

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[87] Plaintiffs' Memorandum in Support (doc. no. 58), at 20.

[88] *Id.* at 21 (citing Plaintiffs' appendix of authorities (doc. no. 57), Ex. 12 (*Intimate Matters: A History of Sexuality in America*), at 4-5).

[89] Plaintiffs' Memorandum in Support (doc. no. 58), at 22 (citing Plaintiffs' appendix of authorities (doc. no. 57), Ex. 36 (*Americanization of the Common Law*), at 31, 110).

[90] *See* Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 26.

> involving marital rape exceptions today typically involve estranged couples.[91]

**2. Eighteenth Century – The Revolutionary Period**

Plaintiffs' undisputed historical evidence also shows that the previously unified seventeenth century attitudes of church and state were followed in the eighteenth century by a decline in the enforcement of laws proscribing consensual sexual acts. Dr. Bullough states that,

> [b]y the beginning of the eighteenth century, . . . the influence of the Church was in decline. At the time of the American Revolution, and certainly by the end of the century, the enforcement of laws prohibiting private, adult consensual behavior[] was rapidly disappearing—and penalties were being reduced to misdemeanors.[92]

Seventh Circuit Judge Richard A. Posner writes, similarly, of the "dismantling of many Puritan sex laws in . . . the American states," and the "gradual although irregular decline in sexual repression" that occurred during the eighteenth century.[93] For example, in 1786, Massachusetts reduced its penalties for fornication from whippings and forced marriage to imprisonment, fines, and/or confessions of guilt.[94] Historian William E. Nelson contends that this "breakdown

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[91] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶ 6.

[92] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 27.

[93] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (Richard A. Posner, *Sex and Reason* (1992)), at 16 (hereinafter *Sex and Reason*).

[94] *See id.*, Ex. 14 (*First Laws of the Commonwealth of Massachusetts* (M. Glazier, ed. 1981)), at 245-46.

of ethical unity" is evidenced by the fact that prosecution for sex crimes like fornication came to a virtual standstill in Massachusetts beginning in the 1780s.[95]

> During the fifteen years before the Revolution, . . . there had been an average of seventy-two prosecutions per year for sexual offenses, nearly all for fornication. The first ten years after independence produced only a slight decline to fifty-eight cases each year. However, in 1786 the General Court enacted a new statute for the punishment of fornication, permitting a woman guilty of the crime to confess her guilt before a justice of the peace, pay an appropriate fine, and thereby avoid prosecution by way of indictment in the court of sessions. The number of prosecutions for sexual offenses immediately declined to an average of eleven per year during 1786-1790 and to less than five per year during the four decades thereafter. It appears that after 1790 women simply stopped confessing their guilt of fornication, apparently aware that even though they did not confess it was most unlikely that they would be indicted. Indeed, only four indictments were returned in the entire Commonwealth after 1790; most sexual prosecutions after that date were for more serious offenses such as adultery, public lewdness, or the publication of obscene matter . . . .[96]

Nelson offers an explanation for this decline:

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[95] *Id.*, Ex. 36 (*Americanization of the Common Law*), at 110.
[96] *Id.*

> To many contemporaries the deemphasis of prosecution for sin appeared to be a decline in morals. President Timothy Dwight of Yale traced the decline to the French and Indian War and especially to the [American] Revolution, which, he said, had added "to the depravation still remaining [from the French War] . . . a long train of immoral doctrines and practices, which spread into every corner of the country. The profanation of the Sabbath, before unusual, profaneness of language, drunkenness, gambling, and lewdness were exceedingly increased. . . ." . . .
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> Notwithstanding these complaints, it does not appear that there was any deep-seated coarseness or general immorality during the closing years of the eighteenth century. *What was beginning to occur after the Revolution was not significantly more immorality but an abandonment of the prerevolutionary notion that government should act to enforce morality.* Over time, . . . the abandonment by government of its enforcement role would impair the notion that there was any one set of ethical standards that all men ought to obey.[97]

Author Cornelia Hughes Dayton has documented similar changes in eighteenth century colonial Connecticut. For example, penalties for sexual offenses like adultery and fornication were reduced, and the number of prosecutions for consensual sex offenses declined.[98] At its pinnacle, the New Haven County Court entertained 107 prosecutions of married persons for fornication from 1730-1739, but that number

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[97] *Id.* at 111 (emphasis supplied) (footnotes omitted).

[98] Plaintiffs' Memorandum in Support (doc. no. 58), at 25.

dropped to zero between 1780 and 1789.[99] In the 1790s, in what Dayton calls the "final act in the privatization and decriminalization of fornication," Connecticut county court judges, "without any statutory prompting, ceased to include fornication cases as a matter of the criminal record, allowing individual justices of the peace to receive pregnant single women, *not as criminals and confessors*, but as *complainants* in threatened paternity suits."[100] Dayton explains this legal shift as mirroring broader societal changes, stating that "by midcentury, new attitudes on the part of legal officers and the middling men of property—who as complainants, jurors, and witnesses were the backbone of the legal system—had pushed aside the Puritan obsession with pressuring all sinners to acknowledge immoral behavior in the most public setting possible."[101] The result was that, "*[g]radually, the regulation of moral behavior was withdrawn from the purview of the community-embodied-in-the-court and lodged in the more informal and amorphous setting of family and neighborhood.*"[102]

### 3. Nineteenth Century – The Dawn of Urbanism and Secularism.

Plaintiffs' undisputed evidence suggests that American attitudes toward adult, consensual sexuality shifted once again at the dawn of the nineteenth century. As Judge Posner notes, "[t]he situation changed dramatically in the nineteenth century."[103] Nineteenth century America witnessed the advent of the Victorian era of "prudery, which came to dominate middle-class thinking in the United States

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[99] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 11 (Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law and Society in Connecticut, 1639-1789* (1995)), at 182, Table 7.

[100] *Id.* at 161 (emphasis supplied).

[101] *Id.* at 159.

[102] *Id.* at 160 (emphasis supplied).

[103] *Id.*, Ex. 39 (*Sex and Reason*), at 16.

. . . [and] was encouraged, systematized, and defended in a growing literature that pronounced sex dangerous on scientific, specifically medical and eugenic, grounds, as distinguished from the older theological grounds."[104] Historian and philosopher Michel Foucault writes that, for the Victorian American middle class,

> [s]exuality was carefully confined; it moved into the home. The conjugal family took custody of it and absorbed it into the serious function of reproduction. On the subject of sex, silence became the rule. The legitimate and procreative couple laid down the law. The couple imposed itself as model, enforced the norm, safeguarded the truth, and reserved the right to speak while retaining the principle of secrecy. A single locus of sexuality was acknowledged in social space as well as at the heart of every household, but it was a utilitarian and fertile one: the parents' bedroom.[105]

Foucault contrasts this period with the comparatively "lax," seventeenth century "[c]odes regulating the coarse, the obscene, and the indecent . . . ."[106] As evidence of this shift in attitude, Judge Posner points to Victorian treatment of "that most characteristic expression of child sexuality, masturbation": while that practice previously had been largely ignored outside theological discourse, Victorian-era scientists seized upon masturbation in children as a cause of

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[104] *Id.*

[105] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 15 (*The History of Sexuality*), at 3.

[106] *Id.*

> feeble-mindedness, insanity, criminality, impotence, homosexuality, early death, sterility, and (when not sterility) deformed offspring. The disapproval of masturbation was not new. For orthodox Catholics it has always been a mortal sin because it is a form of nonmarital, nonprocreative, and therefore "disordered" sex. . . . Victorian sexology was not primarily interested in sin. Its objection to masturbation was medical in the first instance and moral only insofar as a practice that could debilitate the entire race necessarily raised broader concerns than the health of the individual child.[107]

Plaintiffs offer another, related example of changing attitudes toward sexuality in "anti-onanism," the theory that masturbation and auto-ejaculation are harmful to the health, a cause of physical and mental disease.[108] This theory "had a

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[107] *Id.*, Ex. 39 (*Sex and Reason*), at 16-17.

[108] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 26. The theoretical underpinnings of onanism actually were laid out in the early eighteenth century, with the publication of an anonymous pamphlet entitled *Onania: or, The Heinous Sin of Self-Pollution, And all its Frightful Consequences, in Both Sexes consider'd, &c.* (London, 16th ed., 1737). *See* Plaintiffs' appendix of authorities (doc. no. 57), Ex. 24 (Robert H. MacDonald, *The Frightful Consequences of Onanism: Notes on the History of a Delusion*, 28 J. Hist. Ideas 423 (1967)), at 423.

> The author of *Onania* divides his work into three sections, the causes, the consequences, and the cure. His remarks are introduced and accompanied by scriptural interpretation, by which he proves God's detestation for all unnatural practices, and in particular the "Sin of Onan." The causes he sees as ignorance, secrecy in which the sin can be indulged, and the apparent impunity from punishment. The consequences are many and horrible, both to body and soul. Masturbation hinders the growth, is the cause of many a

powerful effect on Western society for the next two centuries."[109] Even so, plaintiffs' undisputed evidence reflects that sexual devices, contraceptives, and abortion became widely available in the nineteenth century, the emergence of which suggests a growing liberalism regarding sexual relationships and sexuality in America. For example, according to Wilson Yates, "birth control information was widely circulated in the last quarter of the nineteenth

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> phymosis and paraphymosis—"I shall not explain these Terms any further, let it suffice that they are very painful and troublesome"—stranguries, priapisms and gonorrheas, thin and waterish seed, fainting fits and epilepsies, consumptions, loss of erection and premature ejaculation, and infertility. From the wretches that survive, children may be expected so sick and weakly that they are "a Misery to themselves, a Dishonour to [sic] Human Race, and a Scandal to their Parents." Women ("to imagine that Women are naturally more modest than Men, is a Mistake") have most of the troubles that afflict men, plus a few of their own. Female masturbators suffer from imbecility, *fluour albus* [leucorrhoea], hysteric fits, barrenness and a "total Ineptitude to the Act of Generation itself."
>
> The cure is both spiritual and physical. The author advocates true repentance, and renunciation of the practice. He proposes marriage as soon as the youth be ripe. Those who have confessed their sin and are prepared to reform are recommended to take cold baths and a milk diet, and to "repair to a skilful Surgeon" and "open their Case, which if he be a sagacious Man, may be done with a very few Hints. . . ." In the later editions the bashful are advised to apply to the bookseller Mr. Crouch (afterwards Mr. Isted) who will furnish them with medicines specially prepared for their complaint. ...

*Id.* at 425 (emphasis and alteration in original) (footnote omitted).

[109] *Id.* at 423. Indeed, this action indicates that the theorem has not entirely dissipated.

century[,] even though the Comstock Law was in effect."[110] Significantly, and despite the anti-vice crusades of the period, Wilson writes that "[d]uring the 1830s, and certainly by 1850, the desire to practice birth control and knowledge of preventives were current in the society and widespread enough to prevent any effective censorship of the subject."[111] Yates submits further that "it is also important in assessing the activity of this period to note that during the 1840s the first United States patent for a contraceptive device was issued."[112]

### a. The appearance of electro-mechanical vibrators

Also suggestive of a growing nineteenth century liberalism regarding sexuality and adult sexual conduct was the invention of the electric vibrator. The emergence and widespread acceptance of this device supports plaintiffs' argument that their right to sexual privacy incorporates the right to use sexual devices. The vibrator "evolved from previous massage technologies in response to demand from physicians for more rapid and efficient physical therapies, particularly for hysteria."[113] Historian and author Rachel Maines explains:

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[110] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 43 (Wilson Yates, *Birth Control Literature and the Medical Profession in Nineteenth Century America*, 31 J. Hist. Med. 42 (1976)), at 51. As discussed in text *infra*, the Comstock Act was an 1873 federal statute that tightened rules against mailing obscene, lewd, or lascivious books or pictures, as well as any article or thing designed for the prevention of conception or procuring abortions.

[111] *Id.* at 47.

[112] *Id.* at 50.

[113] *Id.*, Ex. 25 (Rachel Maines, *The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction* (1999)), at 3.

Massage to orgasm of female patients was a staple of medical practice among some (but certainly not all) Western physicians from the time of Hippocrates until the 1920s, and mechanizing this task significantly increased the number of patients a doctor could treat in a working day. . . .

The demand for treatment had two sources: the proscription on female masturbation as unchaste and possibly unhealthful, and the failure of androcentrically defined sexuality to produce orgasm regularly in most women. Thus the symptoms defined until 1952 as hysteria, as well as some of those associated with cholorosis and neurasthenia, may have been at least in large part the normal functioning of women's sexuality in a patriarchal social context that did not recognize its essential difference from male sexuality, with its traditional emphasis on coitus. . . .

. . . .

[M]arriage did not always "cure" the "disease" represented by the ordinary and uncomfortably persistent functioning of women's sexuality outside the dominant sexual paradigm. This relegated the task of relieving the symptoms of female arousal to medical treatment, which defined female orgasm under clinical conditions as the crisis of an illness, the "hysterical paroxysm." In effect, doctors inherited the task of producing orgasm in women because it was a job nobody else wanted.

> At the same time, hysterical women represented a large and lucrative market for physicians. These patients neither recovered nor died from their condition but continued to require regular treatment. Russell Thatcher Trall and John Butler, in the late nineteenth century, estimated that as many as three-quarters of the female population were "out of health," and that this group constituted America's single largest market for therapeutic services.
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> . . . .
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> The electromechanical vibrator, invented in the 1880s by a British physician, represented the last of a long series of solutions to a problem that had plagued medical practitioners since antiquity: effective therapeutic massage that neither fatigued the therapist nor demanded skills that were difficult and time-consuming to acquire. . . . Among conditions for which massage was indicated in Western medical traditions, one of the most persistent challenges to physicians' skills and patience as physical therapists was hysteria in women. This was one of the most frequently diagnosed diseases in history until the American Psychiatric Association officially removed the hysteroneurasthenic disorders from the canon of modern disease paradigms in 1952.[114]

Despite the emergence of these electromechanical devices, plaintiffs' evidence shows, without dispute from the Attorney General, that supporters of nineteenth century anti-

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[114] *Id.* at 3-5, 11 (footnotes omitted).

vice movements did not attempt to reform the law, to proscribe their distribution or possession. "In the states surveyed, no laws were passed in the nineteenth century (or later) banning or regulating private acts of masturbation. Judge Posner writes that no such law has ever been passed in the United States."[115] Author James C. Whorton offers support and a possible explanation for this fact, one that focuses on the *moral* rather than the *legal*:

> Most hygienic ideologists have espoused Christianity, and have seen nature as good because it is designed by God, who is also the author of the laws of morality. . . .
> . . . .
>
> *Health evangelists have typically eschewed coercion and prohibition in favor of education and persuasion*, confident that once the light is seen, individuals will voluntarily follow it. . . .
>
> The quest for purity of society and the individual and the equation of physiological propriety with spiritual value have forced health reformers to present good hygiene as a *moral obligation. The obligation may be to God, to the race, the nation, nature, or simply to self.* But whatever the direction of the obligation, failure to fulfill it constitutes immorality: bad hygiene is evil, disease is a sin. . . .[116]

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[115] Plaintiffs' Memorandum in Support (doc. no. 58), at 27 (citing Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason* 207)).

[116] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 42 (James C. Whorton, *Crusaders for Fitness: The History of American Health Reformers* (1982)), at 6-7 (emphasis supplied).

**b. Comstock Laws**

The Attorney General's evidence does show that the Victorian-era reform effort appeared to lead to at least some legislative action, in the form of the so-called "Comstock Laws": federal and state legislation adopted between 1873 and 1915, and prompted by the religious anti-vice crusade of former Postmaster General Anthony Comstock.[117] *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70 n.19, 103 S. Ct. 2875, 2882 n.19, 77 L. Ed. 2d 469 (1983). The federal Comstock Act of 1873 was a criminal statute designed "for the suppression of trade in and circulation of obscene literature and articles of immoral use." *Bolger*, 463 U.S. at 70, 103 S. Ct. at 2882 (quoting Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873)).[118] The Attorney General

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[117] Plaintiffs' Memorandum in Support (doc. no. 58), at 29.

[118] The federal Comstock Act of 1873, Ch. 258, 17 Stat. 598, provided that:

> [e]very obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where or how or of whom or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, and every letters upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly

points to the Comstock legislation as evidence that "trafficking in sexual devices was indeed regulated and prosecuted during the Victorian era in America."[119]

Even so, plaintiffs' evidence suggests that the Comstock Laws were aberrant to the sexual privacy traditionally afforded to married persons, and to the growing protection extended to non-married persons. The argument that plaintiffs' right of sexual privacy incorporates a right to use sexual devices like those targeted by the challenged Alabama statute is supported by evidence indicating that such sexual devices were not the impetus for the so-called Comstock Acts. As Rachel Maines explains,

> vibrators and dildos were not significant motivations for the passage and enforcement of the Comstock Act. Vibrators were legally mailable matter throughout the Comstock era (1873-1915), and were in fact mass-marketed in household magazines such as *Modern Priscilla* and *Woman's Home Companion.* They appeared in the Sears, Roebuck catalog

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> take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court.

*United States v. Chase*, 135 U.S. 255, 257-58, 10 S. Ct. 756, 756-57, 34 L. Ed. 117 (1890). The 1873 Act was amended in 1876 to include trafficking of such goods through the mails. *See* Act of July 12, 1876, 19 Stat. 90. Both the 1873 and 1876 Acts were repealed, and the 1876 Act was replaced by 18 U.S.C. § 1461.

[119] Defendant's Memorandum in Support (doc. no. 78), at 14 (heading for Part B).

> as well. The Comstock Act was enforced almost entirely against contraceptives, pornographic pictures, texts and other representations. . . . The "Articles of immoral use, of rubber, etc." with which the New York Society for the Suppression of Vice (NYSSV), Comstock, and the Post Office were concerned were almost all contraceptives. . . . Although a few dildos were seized in raids on vendors of rubber goods, it is clear from the NYSSV's own records that these were isolated incidents.[120]

Maines states further that, "[a]lthough Anthony Comstock himself may have seized and destroyed some dildos in his notoriously warrantless raids on retailers and manufacturers of rubber contraceptive devices, the evidence from primary sources, including cases, indicates clearly that enforcement of the Comstock laws was directed against contraceptives, abortion, and sexually[] oriented writings and pictures."[121] In fact, "[v]ibrators remained legal throughout this period, and were mailable matter under the Comstock laws of 1873-1914."[122] The popularity, legality, and ease of access to sexual devices like vibrators and dildos further demonstrate that the firm legislative respect for sexual privacy in the marital relationship extended to deliberate non-interference with adults' use of sexual devices within those relationships. For example, plaintiffs note that "a search of federal court decisions from that period uncovered no cases in which there were prosecutions for distribution of sexual devices.

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[120] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 4 (Second Declaration of Rachel Maines), ¶ 4 (citations omitted).

[121] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. A (Declaration of Maines), at 17.

[122] *Id.*

Similarly, there are no reported decisions for this conduct under the Act as it now exists."[123]

States enacted statutes similar to the federal Comstock Act that prohibited the sale of "instruments for immoral purpose."[124] One example was a Massachusetts law passed in 1879 that banned the sale of "instruments or other articles for self-abuse," and "for the prevention of conception or abortion."[125] As with the federal Comstock Act, however, plaintiffs state that "a search of Massachusetts court decisions uncovered no cases involving prosecutions under the statute."[126]

Rachel Maines echoes this statement regarding the modern-day incarnation of the federal Comstock Act: "There are no references to cases involving dildos and vibrators in either the annotations to the U.S. Code for 18 U.S.C. [§] 1461 or in *Federal Cases* . . . ."[127] A search of relevant case law by this court yielded the same result.

Plaintiffs contend that, historically, Alabama courts have been reluctant to establish a rule that sexual activity between persons outside the bonds of matrimony was illegal *per se*.[128] This is the case even though the State of Alabama enacted legislation criminalizing adultery and fornication during the nineteenth century (although it did not amend its penal code to include a prohibition on sexual devices until nearly 150 years later).[129] Indeed, "[e]very southern state discouraged fornication, defined as sexual intercourse by unmarried persons or sexual intercourse by married persons

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[123] Plaintiffs' Memorandum in Support (doc. no. 58), at 30.

[124] *Id.* (collecting statutes).

[125] *Id.* at 31.

[126] *Id.*

[127] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. A (Declaration of Maines), at 17 (citations omitted).

[128] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 32.

[129] *See id.* at 31-32 (citing Alabama cases and statute dating from 1852).

with unmarried persons."[130] Despite this legislation and concomitant attitudes toward extra-marital sexual conduct, plaintiffs' undisputed evidence suggests that the "primary reason for the prohibition was to protect the sanctity of marriage, not to prevent sexual activity as such."[131] Essentially, such legislation did not seek to monitor or invade adult sexual relationships; rather, states sought to protect, and encourage the perpetuation of, the marital union. As support for this proposition, plaintiffs point to *Quatermas v. State*, 48 Ala. 269 (1872), in which the Alabama Supreme Court held that adultery was not an indictable offense, unless was committed openly and notoriously. "The parties accused must live together in adultery or fornication, or at least the conduct of the parties must be of such a character as to become, openly, an evil example—an outrage upon decency and morality." *Id.* at 271. The Alabama Supreme Court acknowledged that, in the absence of regular and openly notorious sexual misconduct between persons not married to one another, "occasional act[s] of criminal intimacy" were "punishable only in *foro conscientiae* [*i.e.*, the tribunals or courts of conscience]—municipal justice could not reach it." *Collins v. State*, 14 Ala. 608, 610 (1848). Fornication was ultimately decriminalized in 1975, when Alabama revised its penal code.

Despite the emergence of Victorian morality and anti-sexual vice crusades, plaintiffs claim, without dispute, that state regulation of consensual adult sexual activity had declined by the end of the nineteenth century, thereby continuing to protect the marital sexual relationship, and continuing the liberalizing trend of state non-interference with private, consensual, sexual relationships between

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[130] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 4 (Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth Century South*, 78 J. Am. Hist. 835 (1991)), at 838.

[131] *Id.*

unmarried adults.[132] As John D'Emilio and Estelle B. Freedman write:

> Older means of maintaining sexual values no longer operated effectively in a mobile and industrializing society. Parental power, and particularly fathers' control over their children through the dispensation of property, had been eroding since the mid-eighteenth century. Nor did traditional church discipline retain its power to shame individuals into conformity to the sexual values of the congregation, although ministers continued to offer up church discipline, as it had in early America. *The new laws formulated by the American state and federal governments took a laissez-faire attitude toward regulation of the family in general and of sexuality in particular. In the early nineteenth century, property rather than morals offenses preoccupied legislatures and courts. . . . [T]he task of sexual regulation fell largely to the family, and especially to women.* At the same time, increasing secularization and the rise of the medical profession began to shift authority over sexuality from clergy to doctors. *Doctors and women agreed that individuals should internalize control over sexuality.*
>
> . . . .
>
> At the same time, the advice literature called attention to the importance of sexuality in personal life, often elevating it as a powerful force imbued with possibilities for heightened

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[132] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 33.

> marital intimacy and even spiritual transcendence.[133]

As further support for this proposition, plaintiffs submit, again without dispute, that their review of the reported decisions from this period failed to produce any cases in which married persons were prosecuted for sexual activity within the marital relationship.[134] This included prosecution for violation of state sodomy laws, which, according to the Model Penal Code, were enforced "against consenting adults only rarely and against husband and wife virtually never."[135] Dr. Bullough similarly suggests that, despite Comstock-era legislation, there was a reluctance to enforce laws governing sexual activity for violations committed by married adults (and even by consenting adults generally). Dr. Bullough acknowledges the restrictive attitudes of the Victorian era, agreeing with Foucault that "the bedroom was more or less sacrosanct in the United States,"[136] but contends that,

> [d]espite the onset of the Victorian era and the Age of Comstock (1873-1915), *there was no accompanying widespread attempt to enforce laws dealing with private, consensual, adult sexual content.* Contrary to public misconception, the Comstock laws of the era were not directed at sexual activity, but at the

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[133] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 12 (*Intimate Matters: A History of Sexuality in America*), at 66-67 (emphasis supplied).

[134] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 33.

[135] *Id.* (quoting Plaintiffs' appendix of authorities (doc. no. 57), Ex. 31 (The American Law Institute, *Model Penal Code* § 213.2 cmt. 1 (1980)). Sodomy is defined as either "sexual intercourse with a member of the same sex or with an animal," or as "noncoital and especially anal or oral sexual intercourse with a member of the opposite sex." *The Merriam Webster Dictionary* 691 (1997).

[136] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 26.

> sale of obscene materials and birth control information and products.
>
> Even at the height of the Comstock era, *enforcement of laws directed at consensual adult activity was extremely rare*, except in cases involving conduct considered open and notorious. . . . *Through this entire period laws purporting to regulate adult sexual conduct continued to fall into further and further disuse*. Much of this history is documented in the published drafts of the *Model Penal Code*, which *proposed that crimes involving consensual adult sexual conduct be eliminated as criminal offenses. Many states adopted the* [Model Penal Code] *and eliminated those crimes.*[137]

In summarizing these changing nineteenth century societal attitudes toward sexuality and sexual privacy, Judge Posner notes that, despite the emergence of Comstock laws and other anti-vice crusades that attempted to suppress pornography, abortion, prostitution, contraception, and obscene books and materials, "[t]hese developments coexisted with, and *by no means smothered, the early flames of the sexual revolution.*"[138]

**B. Twentieth Century Contemporary Practice Extends the Historical Right of Sexual Privacy to Unmarried Adults**

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[137] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶¶ 4-5 (emphasis supplied).

[138] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 61 (emphasis supplied).

In light of the fundamental rights analysis employed by the *Glucksberg* Court, the parties may also point to evidence of contemporary practices in this country that evince or contravene a fundamental right of sexual privacy. Plaintiffs rely on such evidence to prove that this right extends to unmarried individuals, and that it includes the right to use sexual devices like the ones targeted by Alabama Code § 13A-12-200.2(a)(1). *See Glucksberg*, 521 U.S. at 715-16, 117 S. Ct. at 2265-66. What follows is a consideration of the parties' evidence of contemporary practices.

Plaintiffs' undisputed evidence shows that the role of state and federal governments in regulating consensual, adult, sexual activity continued to change into the twentieth century, and "[b]y the end of the 1920s . . . the state withdrew almost entirely from the regulation of private, adult sexual activity."[139] Even so, Judge Posner writes that "sex by the end of the nineteenth and beginning of the twentieth century had become, as insistently as in the early Christian era, a matter for troubled, self conscious reflection: an issue."[140] Dr. Bullough suggests similarly that the early part of the twentieth century was marked by a "devot[ion] to overcoming the misinformation about sexual practices promulgated during the nineteenth century."[141] Judge Posner explains that the First World War "ushered in what is popularly but also accurately called the sexual revolution," and that convulsion coincided with "such relevant and technical changes as the widespread availability of cheap and effective contraceptives, both male and female; the decline of religious authority; and the decline in infant mortality, which, coupled with a decreasing desire for large families,

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[139] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 30.

[140] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 54.

[141] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶ 31.

liberated women from a life of continual pregnancy . . . ."[142] He observes further that,

> between about 1920 and 1980 there were dramatic changes in sexual mores, both in the United States and in most Western countries. Among the changes are these:
>
> - The incidence of premarital intercourse rose steeply, especially among women. No longer are most women virgins when they marry. This is true even after correction is made for changes in the age of marriage.
> - Legalized abortion and sex education increased, and restrictions on the distribution of contraceptives, even to minors, dwindled.
> - The marriage rate fell.
> - The divorce rate skyrocketed, and with it cohabitation in lieu of, as well as in preparation for, marriage. *With nonmarital sex so utterly commonplace, the word fornication, with its strong pejorative connotations, has virtually passed out of the language.*
>
> . . . .
>
> - *Social tolerance for noncoercive deviant sexual acts, such as heterosexual sodomy between spouses and homosexual activity between consenting adults, has increased to the*

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[142] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 54 (emphasis supplied).

> *point where these acts have been decriminalized in many nations and in many states of the United States. Even where they remain prohibited, efforts at enforcement are perfunctory at best, and the prohibited behavior may actually be flaunted.*[143]

Plaintiffs' undisputed evidence further reflects that Americans and their legal systems became increasingly liberal regarding adult sexuality and the privacy afforded private, consensual, adult sexual relationships in the twentieth century. For example, at the advent of the twentieth century, "Comstock and his approach to sexuality increasingly lost public support."[144] During that period, controversial birth-control advocate Margaret Sanger, one of the most vocal opponents of state and federal Comstock legislation, made attempts to distribute contraceptive information through the mails.[145] Although Comstock "had her arrested and charged, before she was tried for her actions, Comstock had died, and the charges were dropped."[146] In addition, "American public discourse" became "heavily

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[143] *Id.* at 55-56 (emphasis added).

[144] *Id.*

[145] *See id.*; *see also Margaret Sanger Papers Project*, http://www.nyu.edu/projects/sanger/ms-bio.htm (last visited September 23, 2002).

[146] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 32. Interestingly, Planned Parenthood Federation of America, Inc., which was founded by Sanger in 1916, reports (perhaps in hyperbolic fashion) that Sanger "brought about the reversal of federal and state 'Comstock laws' that prohibited publication and distribution of information about sex, sexuality, contraception, and human reproduction." Planned Parenthood Federation of America, Inc., *Margaret Sanger*, http://www.plannedparenthood.org/about/thisispp/sanger.html (last visited June 17, 2002).

influenced" by the writings of Dr. Sigmund Freud.[147] Wealthy industrialists, like John D. Rockefeller, Jr., began to lend substantial financial support to the study of sexuality.[148] With such funding, scientists and researchers began to publish studies of sexuality in the United States, including the influential Kinsey studies of *Sexual Behavior in the Human Male* (1949) and *Sexual Behavior in the Human Female* (1953), and the Masters and Johnson studies of *Human Sexual Response* (1966) and *Human Sexual Inadequacy* (1981).[149] The conclusion, if not revelation, of the Kinsey studies was that

> men and women regularly and widely engaged in such activities as adultery, fornication, sodomy, and masturbation. The findings of these studies served to demonstrate that what was once considered "deviant" is in fact quite normal and common. As a result, American attitudes about sexuality changed drastically:
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> [S]tudies undertaken soon after publication suggested that Kinsey's work did liberalize attitudes, especially among the young. His findings publicized not only the sexual diversity, but also the gap between ideals and reality in America. Such information about the prevalence of certain "questionable

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[147] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. J (Bullough Declaration), ¶ 33.

[148] *See id.*

[149] *See* Plaintiffs' appendix of authorities (doc. no. 57), Exs. 21-22 (Alfred C. Kinsey *et al.*, *Sexual Behavior in the Human Male* (1949); Alfred C. Kinsey *et al.*, *Sexual Behavior in the Human Female* (1953)); Exs. 27-28 (William H. Masters and Virginia E. Johnson, *Human Sexual Inadequacy* (1981); William H. Masters and Virginia E. Johnson, *Human Sexual Response* (1966)); *see also id.*, Ex. 39 (*Sex and Reason*), at 19 (noting the importance of the Kinsey studies).

> practices" tended to alter attitudes in the direction of tolerance. . . . With consummate skill he dispelled ignorance about changes in sexual mores which had already taken place, *sub rosa*, since World War I. In presenting Americans with a *fait accompli*, his work demanded more realistic, more humane sex mores.[150]

Adding to the specter of a twentieth century sexual liberalism that protected the sexual privacy of both married and unmarried adults are the early- and mid-twentieth century decisions of the Supreme Court. As evidence of these changes, plaintiffs point, for example, to *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925), which recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control," and *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), which also protected parental control over education. In *Meyer*, the Court held that,

> [w]hile this court has not attempted to define with exactness the [Fourteenth Amendment] liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful

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[150] Plaintiffs' Memorandum in Support (doc. no. 58), at 37-38 (citations to Kinsey and other, similar studies omitted) (quoting Plaintiffs' appendix of authorities (doc. no. 57), Ex. 33 (Regina Markell Morantz, *The Scientist as Sex Crusader: Alfred C. Kinsey and American Culture*, 29 Am. Q. 563 (1977)), at 583).

> knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Meyer*, 262 U.S. at 399, 43 S. Ct. at 626-67 (overturning state law prohibiting instruction in schools of language other than English) (collecting cases). In *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), the Court acknowledged procreation, "the right to have offspring," as "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[2] *Id.* at 536, 541, 62 S. Ct. at 1113 (overturning a state law that provided for sterilization of criminals). Later twentieth century decisions of the Supreme Court confirmed: a right to privacy in the body, *see Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (overturning state criminal conviction for violation of due process where evidence was forcibly extracted from defendant's mouth and stomach); the right to marital privacy, *see Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (overturning state law forbidding use of contraceptives as unconstitutional); the right to marry, *see Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (overturning Virginia anti-miscegenation statute); the right to privacy as incorporating a right to use contraceptives, *see Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 34 (1972) (holding unconstitutional a state law prohibiting the distribution of contraceptives to single persons, but not to married persons); and, the right to privacy as incorporating a right to reproductive choice, *see Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (overturning state law that prohibited abortion).

Plaintiffs explain that, out of these decisions and changing societal attitudes toward adult sexuality and sexual

privacy, came the American Law Institute's exhaustive evaluation of criminal law in the United States, and, the 1980 draft of the Model Penal Code ("MPC"). Designed for adoption by the states, the drafters explained that the MPC

> *makes a fundamental departure from prior law in excepting from criminal sanctions deviate sexual intercourse between consenting adults.* This policy applies to the various styles of sexual intimacy between man and wife, and to sexual relations between unmarried persons, regardless of gender. . . . [U]nder the Model Code deviate sexual intercourse is not criminal where both participants consent, where each is of sufficient age and mental capacity to render consent effective, and where they conduct their relations in private and create no public nuisance.[151]

The drafters of the MPC emphasized that state interests in criminalizing "deviate sexual intercourse" between consenting adults also stopped at the threshold to the marital chamber.

> So-called deviate sexual intercourse between spouses [like sodomy] may contravene an ethical or religious notion that there is one "right" way to achieve sexual gratification, *but there is nothing approaching societal consensus on this point. Both the popular literature and available empirical data reveal that such practices are anything but uncommon.* Moreover, current scientific

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[151] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 31 (*Model Penal Code*), at 362-63 (emphasis supplied).

> thinking confirms that so-called deviate sexual intercourse may actually be part of a healthy and normal marital relationship. While it is difficult to see that non-standard sexual intimacy between spouses occasions any harm of which the state properly might take cognizance, *it is easy to identify criminal sanctions for such conduct as inconsistent with the societal goal of protecting the marital relationship against outside interference. Indeed, it seems likely that the newly enunciated constitutional right of marital privacy extends to all forms of consensual sexual activity between husband and wife.*[152]

Notably, the drafters of the MPC also advocated that similar policies should apply to unmarried persons, and even questioned whether sexual intimacy out of wedlock was a "wrong."[153] Given these views, and the fact that "American penal statutes against fornication and adultery are generally unenforced,"[154] the MPC recommended that "private immorality should be beyond the reach of the penal law,"[155] and that states should punish only "non-consensual sexual acts between any two people regardless of sex."[156]

As further evidence of the growing protection for, and state non-interference with, consensual, sexual relationships between married persons and unmarried adults, plaintiffs state that, by the time of the MPC's drafting, half of the states had excluded adultery and fornication from their

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[152] *Id.* at 363-64 (emphasis supplied) (footnotes omitted) (citing cases, including *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), for the constitutional right to marital privacy).

[153] *Id.* at 365.

[154] *Id.* at 434.

[155] *Id.* at 439.

[156] Plaintiffs' Memorandum in Support (doc. no. 58), at 40.

penal codes.[157] (Alabama, as noted above, decriminalized fornication upon revision of its criminal code in 1975, but maintained its prohibition against adultery.[158]) Moreover, while twenty-five states prohibited adultery and sixteen proscribed fornication prior to 1980, "few states still maintain [adultery and fornication] laws, and those that do rarely enforce them."[159] The Attorney General concedes this point, and states that, with some "notable" exceptions, "it is evident that states have historically exerted little effort in interfering with persons' private, consensual sexual activities. . . . Otherwise, the historical record of legislative activity or prosecutions in this area is sparse."[160] This is the case even though, according to Judge Posner (writing in 1992),

> - The average age of first intercourse has fallen dramatically for both sexes, but particularly for women.
> - The rates of teenage pregnancy and illegitimate births have soared, but the increase in the illegitimate-birth rate has been more than offset by a decline in the legitimate birth-rate, resulting in a net decline in the over-all birth rate.
> - With most "respectable" girls and women no longer averse to premarital sex, prostitution has diminished.[161]

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[157] *See id.* at 41.

[158] *See* Ala. Code § 13A-13-2 (1975) (1994 Replacement Vol.) (prohibiting sexual intercourse when coupled with cohabitation between one person and another not his spouse).

[159] Plaintiffs' Memorandum in Support (doc. no. 58), at 46 & n.8.

[160] Defendant's Memorandum in Support (doc. no. 78), at 16-17.

[161] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 56.

Judge Posner points to a series of newspaper articles as evidence for his conclusion that "prosecutions [for adultery] have become so rare as to be front-page news . . . ."[162]

Similarly, plaintiffs note that, at the time *Bowers v. Hardwick* was decided by the Supreme Court in 1986 (upholding Georgia's criminal sodomy statute), twenty-four states had criminal sodomy prohibitions.[163] 478 U.S. 186, 192, 106 S. Ct. 2841, 2844, 92 L. Ed. 2d 140 (1986). Today, just eleven states criminally proscribe sodomy, and at least four of those provide for exceptions from prosecution.[164] Indeed, in the matter of *Bowers v. Hardwick*, although respondent Hardwick was arrested for violating Georgia's sodomy statute, the district attorney assigned to the criminal case decided not to prosecute Hardwick under the law. *See id.* at 188, 106 S. Ct. at 2842. Twelve years later, the Georgia Supreme Court determined that "unforced, private, adult sexual activity" was encompassed within that State's constitutional right to privacy. *Powell v. State*, 510 S.E.2d 18, 22-23, 24 (Ga. 1998) (noting, however, that Georgia's right to privacy is broader than that guaranteed by the United States Constitution). Accordingly, the *Powell* Court overturned as unconstitutional the very sodomy statute that had resulted in Hardwick's arrest. *See id.* (overturning Ga. Code § 16-6-2(a)).

The imagery and implements of adult sexual relationships also pervade modern American society, further supporting plaintiffs' undisputed argument that state non-interference with private, consensual, adult sexual

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[162] *Id.* at 261 n.44 (citing articles). One Milwaukee County, Wisconsin, District Attorney stated that no one had been prosecuted for adultery in that jurisdiction for more than twenty-five years, and that, in his opinion, "prosecuting someone for adultery today would amount to a selective enforcement of the law, which would violate the equal protection clause of the Fourteenth Amendment." *Id.*, Ex. 20 (*Milwaukee Journal Sentinel*, Jan. 18, 2001), at 2.

[163] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 48.

[164] *See id.* at 48-49 (collecting statutory provisions).

relationships continued to solidify in the twentieth century. Judge Posner notes that "[p]ornography of the grossest sort circulates widely with little interference from the law."[165] Dr. Bullough points to the development and widespread marketing of Viagra (including by such notable personalities as former United States Senate Majority Leader and 1996 Republican presidential candidate Robert J. Dole and popular NASCAR driver Mark Martin), an erectile dysfunction medication prescribed more than 39 million times, and to more than 10 million men, between its initial public dissemination in 1998 and the date of this opinion.[166] Maines states that vibrators have been mass-marketed since *1899*, and continue to be advertised in the print and Internet media, as in "airline magazines, *Cosmopolitan*, and such upscale mail-order catalogs as the *Sharper Image*."[167] Maines additionally notes that the May 2002 issue of *American Demographics* reports that "16.3 million Americans use vibrators or other sex toys," while retailers report annual sales in such sexual devices of approximately ten million dollars nationwide.[168] Further, just two States other than Alabama restrict the distribution of sexual devices.[169]

### C. Plaintiffs' Evidence Demonstrates the Existence of a Fundamental Right to Sexual Privacy

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[165] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 56.

[166] *See* Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶ 9; *see also* "About Viagra," http://www.viagra.com/about/index.asp (last visited June 18, 2002).

[167] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 4 (Second Maines Declaration), ¶ 5.

[168] *Id.* (citations omitted).

[169] These are Georgia and Texas.

Plaintiffs' undisputed evidence has shown that there is a historical practice and contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity, and, a concomitant avoidance of prosecutions against married and unmarried persons for violations of statutes that proscribe consensual sexual activity. The Attorney General has conceded plaintiffs' evidence in this regard. This evidence leads plaintiffs to argue that "the 'deeply rooted' respect for marital privacy shields [married and] unmarried persons from intrusions into their sexual lives and bedrooms . . . ."[170] Given the breadth, depth, volume, and weight of that evidence, and the Attorney General's concession, this court is compelled to agree. Dr. Bullough concludes that

> *there is no history []or tradition in this country of regulating the sexual practices or activities of married individuals in their own homes* nor is there any precedent for regulation of marital sexual activities in the laws of our European ancestors. . . . [T]he puritanical mores that dominated the seventeenth and eighteenth century colonial America took a healthy view of sexual activity, provided it was confined to the marital bedroom. Although sexual activity was pervasively regulated during this period, it did not cross the marital boundary. *This tradition of non-interference with what people did within the privacy of their marital chamber carried down through the nineteenth and twentieth centuries and was eventually extended to establish a pattern of non-*

[170] Plaintiffs' Memorandum in Support (doc. no. 58), at 50.

> *interference with virtually all consenting adult sexual behavior.*[171]

Judge Posner's interpretation of Supreme Court jurisprudence in recent decades is in accord:

> [The Supreme Court] must have been bothered by the fact that *Griswold* had been so emphatic about *marital* privacy, implying that unmarried couples had fewer rights. For the Court added [in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)]: "The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*" Read literally, all this hyperbolic passage says is that the government cannot force unmarried persons, any more than it can force married persons, to have children—a proposition few will quarrel with, although its provenance in the text or history of the Constitution is not easy to find. *Implied, however, is the further proposition that* notwithstanding the unchallenged misdemeanor fornication law (easily overlooked because totally unenforced),

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[171] Plaintiffs' supplemental evidentiary submissions (doc. no. 84), Ex. 3 (Second Bullough Declaration), ¶ 6 (emphasis supplied).

> *unmarried persons have a constitutional right to engage in sexual intercourse.*[172]

In the original opinion entered in this case, this court declined to "extend the fundamental right of privacy to protect plaintiffs' interest in using devices designed or marketed as useful primarily for the stimulation of human genital organs when engaging in lawful, private, sexual activity, and thereby impose a strict scrutiny frame of analysis when reviewing the Alabama statute at issue." *Williams*, 41 F. Supp. 2d at 1284 (internal quotation marks omitted). Given the instructions of the Eleventh Circuit on review of that opinion, however, the overwhelming evidence submitted by plaintiffs in support of their motion for summary judgment (and in refutation of the Attorney General's motion for summary judgment), and the concession to this evidence by the Attorney General, this court concludes that plaintiffs have met their burden of showing that there is a "history, legal tradition, and practice" in this country of deliberate state non-interference with private sexual relationships between married couples, and a contemporary practice of the same between unmarried persons. *Glucksberg*, 521 U.S. at 710, 117 S. Ct. at 2262. Unlike *Bowers* and *Glucksberg*, where proponents of the offending statutes were able to demonstrate a long history, tradition, and contemporary practice, respectively, of *prohibiting* sodomy (albeit, generally in the context of homosexual plain relationships) and suicide, respectively, plaintiffs' evidence establishes that there exists a constitutionally inherent right to sexual privacy that firmly encompasses state *non-interference* with private, adult, consensual sexual relationships. *See Williams*, 240 F.3d at 954, 955 (characterizing plaintiffs' right at issue as one of "sexual privacy"); *see also Glucksberg*, 521 U.S. at 710-19,

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[172] Plaintiffs' appendix of authorities (doc. no. 57), Ex. 39 (*Sex and Reason*), at 330-31 (emphasis added).

117 S. Ct. at 2262-67; *Bowers*, 478 U.S. at 192-94, 106 S. Ct. at 2844-46. The court notes that this right to sexual privacy cannot be limited to a mere right to "sex," when the decisions of the Supreme Court protecting abortion, contraception, and the right to privacy in our bodies are considered.

One inquiry remains, nevertheless: Does this fundamental right of sexual privacy between married and unmarried adults in private, consensual, sexual relationships encompass a right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas distributed by the vendor plaintiffs in this action? Plaintiffs' substantial and unrefuted evidence demands an affirmative response to that question. Another Alabama district court appears to agree. *See, e.g., Cohen v. City of Daleville*, 695 F. Supp 1168, 1173 n.7 (M.D. Ala. 1988) ("[T]he mere possession of artificial vaginas, artificial penises and similar sexual aids is protected by the right to privacy.") (citations omitted).

Plaintiffs' evidence shows, first, that such sexual devices are used by individuals (including plaintiffs) to consummate the most private acts—whether they be medically, therapeutically, or sexually motivated. The user plaintiffs all have averred that their own use of these devices is contained within the confines of their adult sexual relationships. Further, while these devices may be used for masturbatory purposes, masturbation is not now, nor has it ever been, a crime in any state of the Union.[173] Moreover, one of the most widely known sexual devices—the vibrator—has been legally and widely available since its invention in the mid-nineteenth century: first in doctors' offices, and later through magazine advertisements, mail-order catalogs, on the Internet, and retail outlets in the forty-seven states that do not restrict distribution of sexual devices. Just as states have deliberately avoided interference in the sexual relationships of married and unmarried adults

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[173] *Id.* at 207.

(historically as to married adults, and contemporarily as to unmarried adults), states have deliberately, and with few exceptions, avoided the regulation of these sexual devices. The fact that history and contemporary practice demonstrate a conscious avoidance of regulation of these devices by the states, along with the fact that such devices are used in the performance of deeply private sexual acts, supports a finding that the right to use these sexual devices is encompassed by plaintiffs' right to sexual privacy.

**D. Burden on Plaintiffs' Right to Sexual Privacy**

At this juncture, the question becomes whether Alabama Code § 13A-12-200.2(a)(1) impermissibly burdens plaintiffs' right to sexual privacy, by virtue of its prohibition of the distribution of sexual devices. Plaintiffs' evidentiary submissions substantiate that the user plaintiffs' purchase and use of sexual devices is intrinsic to the sexual relationships they share with their spouses or other partners. For example, plaintiffs Benny and Deborah Cooper state that their use of sexual devices during sexual intercourse "saved" their marriage, and enabled them to improve marital communications, both in and out of their bedroom.[174] Plaintiff Jane Poe similarly states that incorporating sexual devices into her sexual relationship with her husband has removed "strain" upon their intimacy, eliminated fears of infidelity held by each spouse, and improved "every aspect" of the couple's marital communication.[175] Plaintiff Dan Bailey asserts that the use of sexual devices has encouraged intimacy in his sexual relationship with his wife, and that the use of such sexual devices improved the quality of the couple's sexual relations during his bout with erectile

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[174] Plaintiffs' original motion for summary judgment (doc. no. 56), Ex. B (Cooper Declaration), ¶ 6.

[175] *Id.*, Ex. C (Poe Declaration), at 2.

dysfunction.[176] Plaintiff Jane Roe, who is not married, uses these devices in her sexual relationships to permit her to enjoy sexual gratification, as Ms. Roe suffers from a disability that makes sexual intercourse extremely painful.[177] These facts support plaintiffs' contention that, "[t]aken as a whole, these devices are designed to improve or enhance sexual relations or provide an alternative to them."[178] Plaintiffs thus have demonstrated that their use of these sexual devices is an important part of their sexual relationships and, consequently, is protected by their right to sexual privacy.

The Attorney General responds that the State of Alabama has not prohibited the *use* of sexual devices, or their *purchase*, but simply their *sale*, and that Alabama Code § 13A-12-200.2(a)(1) "does not dictate how persons may engage in intimate activity within the sanctity of their own homes."[179] In *Griswold*, the Supreme Court seemed to validate this distinction, stating that

> the present case . . . concerns a [marriage] relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their *manufacture* or *sale*, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.

381 U.S. at 485, 85 S. Ct. at 1682 (emphasis supplied). A careful reading of that passage suggests, however, that the

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[176] *See id.*, Ex. D (Bailey Declaration), ¶ 4. Incidentally, Mr. Bailey's erectile dysfunction was successfully treated with a regular regimen of the prescription medication "Viagra."

[177] *See* Amended and Restated Complaint (doc. no. 55), ¶ 16.

[178] Plaintiffs' Memorandum in Support (doc. no. 58), at 69.

[179] Defendant's Memorandum in Support (doc. no. 78), at 11.

*Griswold* Court was not intent on making a blanket statement that all statutes that solely prohibit the *sale* or *manufacture* of a product in this context, rather than its *use*, are constitutionally permissible.

This court is mindful instead of the *Griswold* Court's instruction: "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom." *Id.* at 485, 85 S. Ct. at 1682. A statute solely prohibiting the sale of a product can nevertheless unconstitutionally infringe on the rights inherent in the "zone of privacy created by several fundamental constitutional guarantees," *id.*, because, in essence, a ban on the *sale* of these sexual devices can amount to an impermissible burden on their *use*. *See Williams*, 240 F.3d at 954 ("[T]he statute prohibiting the distribution of sexual devices would burden an individual's ability to use the devices . . . ."). In the decisions that followed *Roe v. Wade*, for example, the Supreme Court held as unconstitutional statutes that "did not prohibit abortions outright but limited in a variety of ways a woman's access to them." *Carey*, 431 U.S. at 688, 97 S. Ct. at 2017 (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973)). Similarly, in *Carey*, the Supreme Court wrote that a

> *total prohibition against sale* of contraceptives, for example, *would intrude* upon individual decisions in matters of procreation and contraception *as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an*

> *even more devastating effect upon the freedom* to choose contraception.

*Carey*, 431 U.S. at 687-88, 97 S. Ct. at 2017 (emphasis supplied). The Supreme Court makes clear that "the same test must be applied to state regulations that burden an individual's right . . . by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." *Id.* at 688, 97 S. Ct. at 2018 (referring to an individual's right to device to prevent conception or terminate pregnancy). This is the case, "*not because there is an independent fundamental 'right of access to contraceptives'* [or, here, to purchase sexual devices], but because such access is essential to the exercise of the constitutionally protected right. . . ." *Id.* (emphasis supplied).

This court accordingly concludes that Alabama's prohibition of the sale of sexual devices imposes a significant burden on the right of married and unmarried persons to sexual privacy, in that it severely limits their ability to access, and thus to use, sexual devices within their sexual relationships. This is further evidenced by the Attorney General's argument that the user plaintiffs—all Alabama residents—can travel to the State of Tennessee, should they desire to purchase sexual devices.[180] As in *Carey*, Alabama's prohibition on the sale of sexual devices "renders [the devices] considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition." *Carey*, 431 U.S. at 689, 97 S. Ct. at 2018 (contemplating that limits on distribution of contraceptives imposed a "significant burden" on fundamental rights, even though those limits fell short of a total ban on distribution).

Further, while this court does not specifically or exclusively weigh the validity of the so-called "medical

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[180] *See id.* at 7.

affirmative defense" urged by the Attorney General to exempt these plaintiffs from prosecution, *see* Alabama Code § 13A-12-200.4, it is of significance that the Supreme Court has eschewed as unjustifiably burdensome the imposition of medical restrictions on the distribution of contraceptives and the performance of abortions, where the state is unable to demonstrate that the medical restriction is substantially related to the state's interest in protecting the consumer's health. As the *Carey* Court wrote:

> Of particular relevance here is *Doe v. Bolton,* [410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973)], in which the Court struck down, as unconstitutionally burdening the right of a woman to choose abortion, a statute requiring that abortions be performed only in accredited hospitals, in the absence of proof that the requirement was substantially related to the State's interest in protecting the patient's health. 410 U.S., at 193-195, 93 S. Ct., at 748-749. The same infirmity infuses the limitation in § 6811(8) [the New York statute limiting distribution of contraceptives]. "Just as in *Griswold,* where the right of married persons to use contraceptives was 'diluted or adversely affected' by permitting a conviction for giving advice as to its exercise, . . . so here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right." *Eisenstadt v. Baird,* 405 U.S., at 464, 92 S. Ct., at 1043 (White, J., concurring in result).

*Carey*, 431 U.S. at 689-90, 97 S. Ct. at 2018. The Attorney General has offered no explanation as to how the sexual devices at issue here are hazardous to the health of plaintiffs.

Despite plaintiffs' evidence that Alabama Code § 13A-12-200.2(a)(1) burdens their fundamental right to privacy, insofar as that right includes sexual privacy and the right to use sexual devices, not all infringements of a fundamental right are unconstitutional. *See Carey*, 431 U.S. at 685-86, 97 S. Ct. at 2016 ("That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area.") Plaintiffs argue, nevertheless, that the

> challenged statute is a backdoor attempt to discourage or limit the use of sexual devices by removing them from the marketplace. While there may have been other motives for adoption of the statute as well, it does not alter the fact that the effect of the law will significantly diminish the availability of sexual devices in Alabama. Because the mere possession or use of sexual devices implicates important underlying interests in sexual privacy and personal liberty, the user plaintiffs have alleged from the start that the law violates their rights guaranteed under the Due Process Clause of the Fourteenth Amendment.[181]

The Attorney General does not address this issue, either in his own motion, or his response to plaintiffs' motion, for summary judgment. Accordingly, the extent of the burden on plaintiffs' right to sexual privacy, as it encompasses their right to use sexual devices, is considered below.

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[181] Plaintiffs' Memorandum in Support (doc. no. 58), at 50.

**E. Standard of Review and Compelling State Interests for Alabama Code § 13A-12-200.2**

Whether a statute unconstitutionally burdens a fundamental right "is determined in large part by the level of scrutiny applied by the courts." *Williams*, 240 F.3d at 947. If a statute is found to infringe a fundamental constitutional right, it will be subject to strict scrutiny, "which requires that the statute be narrowly tailored to achieve a compelling government interest." *Id.* (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d (1995); *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)); *see also Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682, 54 L. Ed. 2d 618 (1978); *Roe*, 410 U.S. at 155, 93 S. Ct. at 728 (collecting cases). "Most statutes reviewed under the very stringent strict scrutiny standard are found to be unconstitutional." *Williams*, 240 F.3d at 948. However, "even a burdensome regulation may be validated by a sufficiently compelling state interest." *Carey*, 431 U.S. at 686, 97 S. Ct. at 2016.

As a preliminary matter, the Attorney General fails to consider the challenged statute under the lens of strict scrutiny review. Although it is the Attorney General's burden to demonstrate that the infringement of plaintiffs' right to privacy is necessary to support a compelling state interest, *see, e.g., Roe*, 410 U.S. at 156, 93 S. Ct. at 728, defendant fails to shoulder this burden, thus warranting entry of summary judgment in favor of plaintiffs. This is because the Attorney General has failed to offer even one state interest for the challenged statute, much less a compelling state interest. Further, the Attorney General has not attempted to prove that the statute is narrowly tailored to meet those phantom interests. *See also Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001) (citing *Adarand*, 515 U.S. at 227, 115 S. Ct. at 2113; *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1114 (11th Cir. 2001) (citing, in turn, *City of*

*Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11, 109 S. Ct. 706, 730-31, 102 L. Ed. 2d 854 (1989) (regarding defendant's burden in a challenge to a race-based classification subject to strict scrutiny)); *see also Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992) ("If the challenged law burdens a fundamental constitutional right, then the law can survive only if the State demonstrates that the law advances a compelling interest and is narrowly tailored to meet that interest."); (citing *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1019, 103 L. Ed. 2d 271 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 550, 93 L. Ed. 2d 514 (1986); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230 (1979)). The Attorney General instead restricts his argument in support of summary judgment, and in response to plaintiffs' motion for summary judgment, to the issue of plaintiffs' standing, and to his assertion that there is no fundamental constitutional right implicated by the facts of this case.[182] Attorney General Pryor omits any contemplation of the alternatives (which are in fact the conclusions of this court): first, that plaintiffs possess standing to bring their constitutional challenge; second, that plaintiffs enjoy a constitutionally protected right to privacy that encompasses the sexual privacy of married or unmarried persons, and a right to use sexual devices within the confines of a private, consensual, adult, sexual relationship; third, that the statute burdens plaintiffs' right to sexual privacy; and fourth, that the challenged statute is not narrowly tailored to effectuate a compelling state interest.

Even so, the importance of the rights at issue, and the significance of the relief requested, seem to require that this court not grant plaintiffs' motion solely on the basis of the Attorney General's omission. For that reason, the court

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[182] *See generally* Defendant's Memorandum in Support (doc. no. 78).

incorporates the findings of its opinion entered March 29, 1999 on this issue. *See Williams*, 41 F. Supp. 2d at 1257.

In the original opinion, this court determined that the State had put forth "legitimate" interests supporting the passage of Alabama Code § 13A-12-200.2(a)(1). *See Williams*, 41 F. Supp. 2d at 1285-87. Despite that conclusion, this court held that the means by which the State had sought to effectuate those interests were not rationally related to those government interests. *See id.* at 1287-93. The Eleventh Circuit disagreed, and acknowledged that, under that highly deferential standard of review, the statute was not unconstitutional, because the statute "is rationally related to the State's legitimate power to protect its view of public morality." *Williams*, 240 F.3d at 952.

In contrast, this court now engages in a much stricter, exacting review of the offending statute and the interests offered for its justification, because Alabama Code § 13A-12-200.2(a)(1) burdens plaintiffs' fundamental right to privacy, as it encompasses a right to sexual privacy and plaintiffs' consequential right to purchase or use sexual devices. Under this strict scrutiny review, any burden imposed by Alabama Code § 13A-12-200.2(a)(1) on plaintiffs' right to sexual privacy "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686, 97 S. Ct. at 2016 (citing *Roe*, 410 U.S. at 155-56, 93 S. Ct. at 727-28). The first question before the court, then, is whether this burdensome statutory provision serves a compelling state interest. *See Carey*, 431 U.S. at 686, 97 S. Ct. at 2016 ("[E]ven a burdensome regulation may be validated by a sufficiently compelling state interest.").

This court found, in the opinion entered on March 29, 1999, that the Alabama Legislature aided the court by stating a purpose for the 1998 amendments to the Alabama Anti-Obscenity Enforcement Act; and, therefore, that the following state interests could have been implicated in the passage of Alabama Code § 13A-12-200.2(a)(1):

Section 1. The Legislature of Alabama finds and declares:

(1) That in order to protect children from exposure to obscenity, prevent assaults on the sensibilities of unwilling adults by the purveyor[s] of obscene material, and suppress the proliferation of "adult-only video stores," "adult bookstores," "adult movie houses," and "adult-only entertainment," the sale and dissemination of obscene material should be regulated without impinging on the First Amendment rights of free speech by erecting barriers to the open display of erotic and lascivious material.

1998 Ala. Acts 98-467. These findings and declarations clearly suggest that the purpose behind this act was to prohibit "open display[s]" of things "obscene," specifically those displays accessible to "children" and "unwilling adults."

In addition, upon consideration of the pleadings, motions, briefs, oral arguments of counsel, and independent judicial research, the court finds that the state's interest in passing the Act also could have been: (1) the belief that "[t]he commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil, an obscenity . . . detrimental to the health and morality of the state" (Brief of Alabama Attorney General, at 21); or (2) the desire to ban commerce in all "obscene" material.

*Williams*, 41 F. Supp. 2d at 1285-86 (footnotes omitted). The court already has determined that each of these interests is legitimate. *See id.* at 1286-87. Whether they are sufficiently compelling to withstand strict scrutiny is another matter.

States clearly have a compelling interest in protecting children from exposure to obscene material. *See American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) ("[A] state's interest in protecting children from exposure to material obscene as to minors is a substantial and important state interest."). As the Supreme Court has written, "[b]ecause of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." *Ginsberg v. State of New York*, 390 U.S. 629, 636, 88 S. Ct. 1274, 1278-79, 20 L. Ed. 2d 195 (1968) (citation and internal quotation marks omitted); *see also New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 3354, 73 L. Ed. 2d 1113 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620, 73 L. Ed. 2d 248 (1982)).

This court is not convinced, however, that even if the State has a compelling interest in regulating obscenity generally, that interest is compelling in the context of a ban on sexual devices carried out simply because the State abhors the "commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships [as] an evil, an obscenity." *Williams*, 41 F. Supp. 2d at 1285-86. The Attorney General, again, has offered no evidence or argument to this extent. However, the State of Alabama may not declare that all sexual devices are obscene simply because they are used in the context of sex. As Justice

Brennan emphasized when writing for the Supreme Court in *Roth v. United States*,

> *sex and obscenity are not synonymous.* Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material and constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

354 U.S. 476, 487, 77 S. Ct. 1304, 1310, 1 L. Ed. 2d 1498 (1957) (emphasis supplied). Further, while the Supreme Court has acknowledged the "high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults," the Court has done so solely in the context of First Amendment claims of protected speech. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57, 93 S. Ct. 2628, 2635, 37 L. Ed. 2d 446 (1973); *see also, e.g., Ashcroft v. The Free Speech Coalition*, __ U.S. __, 122 S. Ct. 1389, 1402, 152 L. Ed. 2d 403 (2002); *Sable Communications of California*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L. Ed. 2d 93 (1989); *Miller v. California*, 413 U.S. 15, 23, 26, 93 S. Ct. 2607, 2614, 1616, 37 L. Ed. 2d 419 (1973); *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 1280-81, 20 L. Ed. 2d 195 (1968); *Roth*, 354 U.S. at 476, 77 S. Ct. at 1304. No such claims—*i.e.*, that the sexual devices regulated by Alabama Code § 13A-12-200.2(a)(1) infringe protected speech—are present here. Moreover, this court was unable to locate any binding authority to suggest that these state interests might be compelling outside the First Amendment context. *Cf. State*

*v. Brenan*, 772 So. 2d 64, 68 (La. 2000) (Louisiana Supreme Court acknowledged obscenity guidelines established in *Miller v. California* were limited to the First Amendment context,[183] but used that framework to analyze the constitutionality of a Louisiana statute banning promotion of obscene devices).

### F. Alabama Code § 13A-12-200.2(a)(1) is Not Narrowly Tailored to Meet Compelling State Interests

Although a state may be able to demonstrate that its interests in a burdensome regulation are compelling, "to withstand constitutional scrutiny, '[the state] must do so by narrowly drawn regulations designed to serve those interests . . . .'" *Sable Communications of California, Inc.*, 492 U.S. at 126, 109 S. Ct. at 2836 (quoting *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760, 48 L. Ed. 2d 243 (1976), and citing other cases); *see also Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682, 54 L. Ed. 2d 618 (1978) (stating that a burdensome statute must be supported by compelling state interests and "closely tailored to effectuate only those interests"); *Griswold*, 381 U.S. at 485-86, 85 S. Ct. at 1682 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale

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[183] *See Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 491 (1973), where the Supreme Court held:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24, 93 S. Ct. at 2615.

signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

Even if this court were to assume, first, that Alabama's interests in enacting Alabama Code § 13A-12-200.2(a)(1) rise to the level of "compelling," and, second, that the rationale of First Amendment obscenity case law is applicable,[184] the challenged statute still is not narrowly tailored to meet those objectives and, thus, is unconstitutional as applied to these plaintiffs.

As is by now well known, the challenged statute provides that it "shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Alabama Code § 13A-12-200.2(a)(1). Further, "[m]aterial not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica for the sake of prurient appeal." *Id.* The statute provides that violators of this provision "shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for

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[184] The court is particularly reluctant to apply First Amendment obscenity decisions to this case, without acknowledging that these decisions are not "on all fours" with the Fourteenth Amendment challenge at bar. Indeed, the Supreme Court has carved out a specific jurisprudence in the First Amendment arena with regard to obscenity, and this court is not convinced that the special considerations of that body of law are entirely transferable to the facts of this case. First Amendment obscenity case law might be applicable in light of the fact that Alabama Code § 13A-12-200.2(a)(1) was enacted as an amendment to Alabama's existing obscenity statute. Nevertheless, this court must be guided by the authority most relevant to the case at hand, and so looks to the First Amendment obscenity decisions described in this opinion for instruction.

not more than one year." *Id.* Subsequent violations, following a first conviction, amount to a Class C felony, and require corporations or businesses to pay fines of "not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000)." *Id.*

The first purpose offered by the Alabama Legislature for this statutory scheme is to protect children and unwilling adults from exposure to open displays of obscene material, and to suppress the proliferation of adult-oriented entertainment, bookstores, movie houses, and video stores. Alabama's ban on the distribution of sexual devices "sweep[s] unnecessarily broadly" in an attempt to effectuate this state interest, however, *Griswold*, 381 U.S. at 485, 85 S. Ct. at 1682, because it is not narrowly tailored solely to address those interests. *See Zablocki*, 434 U.S. at 388, 98 S. Ct. at 682; *see also American Booksellers v. Webb*, 919 F.2d 1493, 1501, 1502 (11th Cir. 1990). In *Webb*, for example, the Court considered a Georgia criminal statute that prohibited the display of any material "harmful to minors" in a place accessible to minors. The *Webb* Court held that, while the State could deny access to such materials to minors, it could not impermissibly burden the access of adults to the same materials. Thus, the "crucial inquiry" was whether the "restriction on adults' access to protected speech is unnecessarily burdensome or 'significant,' or . . . whether alternate modes of adult access are unduly restricted." *Webb*, 919 F.2d at 1501, 1502.

The challenged statute appears immediately *not* to be narrowly tailored to meet this state objective, when the court considers the statute's effect on vendor plaintiff B. J. Bailey. Ms. Bailey and her Saucy Lady, Inc. enterprise are criminally restricted by the challenged statute, even though Ms. Bailey's private "Tupperware-style" parties are held in private homes, and are advertised solely by word of mouth, rather than by any public display or advertisement. Alabama Code § 13A-12-200.2(a)(1) thus does not narrowly effectuate only the State's interest of protecting children and

unwilling adult viewers from exposure to open displays of sexual devices, because it reaches beyond those public displays to ban the distribution of sexual devices in the private forum of sales parties conducted by Saucy Lady, Inc.

Further, other, narrower, constitutionally-permissible alternatives appear available to the State to safeguard its children and unwilling adults. The State might narrowly prevent exposure by unwilling adults and children to open displays of sexual devices by requiring vendor plaintiff Sherri Williams to alter the outward appearance of her retail stores. *See Williams*, 41 F. Supp. 2d at 1288. Plaintiffs also correctly observe that the State is constitutionally permitted to employ its zoning powers to restrict businesses that distribute sexual devices to locations out of reach and view of children and unwilling adults. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 930, 89 L. Ed. 2d 29 (1986) (approving city's use of zoning to prohibit adult motion picture theaters from locating within one thousand feet of any residential zone, single or multi-family dwelling, church, park, or school); *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999) (acknowledging that governments have a substantial interest in combating the secondary effects of adult businesses, and that zoning is an appropriate method by which governments may protect that interest).

The second purpose offered for the challenged statute is the State's goal of regulating the "commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships [as] an evil, an obscenity . . . detrimental to the health and morality of the state." Alabama Code § 13A-12-200.2(a)(1) is not narrowly tailored to effectuate solely this state interest and, in fact, has the effect of accomplishing the reverse for the user plaintiffs. Each of the user plaintiffs has stated that use of sexual devices during marital and dating relationships has enabled them to, among other things, improve the quality of their marital communications, better their sexual relationships,

encourage intimacy in their marital relationships, eradicate fears of infidelity between spouses, and to combat embarrassing or painful medical conditions. The Attorney General has stipulated to these facts. Further, the parties have stipulated that "a great many" of vendor plaintiff B.J. Bailey's customers have "reported to Ms. Bailey that the products they purchased helped them to become orgasmic and greatly improved their marital and sexual relations."[185] The parties also have stipulated to the fact that vendor plaintiff Sherri Williams' customers include "[m]any" who have been "referred to the store by therapists treating them for sexual dysfunction or marital problems."[186] The parties further have stipulated to the opinions of two experts in the study of human sexuality that "sexual aids help in the revitalization of potentially failing marital relations," and that the use of sexual devices is recommended in "therapy for couples who are having sexual problems in their marriage . . . ."[187] Also compelling is the fact that the State of Alabama's own University Health System Internet site advocates applying a "powerful vibrator on the glans of the penis" to enable men who have suffered spinal cord injuries to ejaculate, for the specific purpose of "impregnat[ing] their wives and hav[ing] normal, healthy children."[188]

Given these facts, the court concludes that Alabama's total prohibition of the distribution of sexual devices is not narrowly tailored to regulate the "commerce of sexual stimulation and auto-eroticism, for its own sake, *unrelated to marriage, procreation or familial relationships* [as] an evil, an obscenity . . . detrimental to the health and morality of the

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[185] Stipulation of Facts (doc. no. 33), ¶ 26.

[186] *Id.* ¶ 14.

[187] *Id.* ¶¶ 65, 77 (statements of Drs. Alfred Jack Turner and Pepper Schwartz).

[188] University of Alabama Health System, "Spinal Cord Injury May Result in Loss of Sexual Function," http://www.health.uab.edu/show.asp?durki=8359 (last visited June 26, 2002).

state." The challenged statute instead serves to prevent the user plaintiffs' access to devices that they, and experts in the field of human sexuality, have averred are integral to growing, preserving, and/or repairing marital and familial relationships.

Finally, while the State of Alabama may have an interest in banning "commerce in all 'obscene' material," the challenged statute sweeps too broadly in an attempt to do so. *See Griswold*, 381 U.S. at 485, 85 S. Ct. at 1682. This is because, while Alabama Code § 13A-12-200.2(a)(1) might have the effect of prohibiting the distribution of those sexual devices that meet the definition of "obscene," it has the added effect of banning the distribution of sexual devices that do not meet that definition.

The often-repeated standard for determining whether matter is obscene (albeit in the First Amendment context) comes from the Supreme Court's decision in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 491 (1973). As that Court explained,

> [t]he basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24, 93 S. Ct. at 2615 (citations and internal quotation marks omitted). In the original, March 29, 1999 memorandum opinion, this court determined that, while the sexual devices at issue here do include penis-shaped dildos and artificial vaginas, many other devices "do not represent

human genitals," and "bear absolutely no resemblance to such organs." *Williams*, 41 F. Supp. 2d at 1291. Other sexual devices include "vibrators and . . . stimulators, which may or may not be in the form of a penis, and may or may not be designed for insertion into the vagina; penis extenders; penis enlargement pumps; genital rings; anal beads; and inflatable dolls." *Id.*

The immediate question under the *Miller* guidelines, then, is whether community standards would dictate that such devices appeal to the prurient interest. *See Miller*, 413 U.S. at 24, 93 S. Ct. at 2615. This court concludes that many of these devices would not and, thus, cannot be considered "obscene." The Supreme Court considers "material appealing to the prurient interest [to be] 'material having a tendency to excite lustful thoughts,'" or "whose predominant appeal is to a shameful or morbid interest in nudity, sex, or excretion." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S. Ct. 2794, 2799, 86 L. Ed. 2d 394 (1985) (citing the Model Penal Code definition of obscenity and *Roth v. United States*, 354 U.S. 476, 487, 77 S. Ct. 1304, 1310, 1 L. Ed. 2d 1498 (1957)). As a preliminary matter, Alabama Code § 13A-12-200.1(17) adopts the *Miller* scheme of obscenity evaluation, although neither *Miller* nor Alabama Code § 13A-12-200.2 characterizes sexual devices as generally obscene or, more specifically, enumerates which sexual devices should be considered obscene.[189] The court

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[189] In fact, as this court noted in its March 29, 1999 memorandum opinion, Alabama Code § 13A-12-200.2(a)(1) is written in the disjunctive. Use of the connector "or" implicitly excludes sexual devices from the material identified as obscene, as follows: "It shall be unlawful for any person to knowingly distribute . . . any obscene material *or* any device designed or marketed as useful primarily for the stimulation of human genital organs . . . ." *Id.* (emphasis supplied). Although the statute then provides that "material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal," *id.*, it appears that this provision should be construed as pertaining specifically

can imagine, as a matter of law, however, that some Alabama communities would find that sexual devices depicting human genitalia, for example, sufficiently prurient as to excite lustful thoughts. Even so, this court cannot say the same for those devices that do not depict the human genitals, and are, instead, innocuous-looking, inanimate objects. *See Williams*, 41 F. Supp. 2d at 1292. Plaintiffs correctly observe that these latter devices may "suggest" sexual conduct, but a mere suggestion of sex will not satisfy the *Miller* obscenity test. Indeed, if the State of Alabama's ban on the distribution of sexual devices stemmed from a desire to prohibit all items that suggest sex, such a goal would directly contravene the Supreme Court's proscription of equating sex with obscenity.[190] *See Roth*, 354 U.S. at 487, 77 S. Ct. at 1310.

Given these facts, and that the Attorney General has failed to offer any evidence to the contrary, the court concludes that not all sexual devices prohibited from sale under the challenged statute can be adjudged legally "obscene." Consequently, Alabama Code § 13A-12-200.2(a)(1) has the sweeping effect of banning the sale of all sexual devices—both those that might be characterized as obscene, and those that could not under the *Miller* test. Accordingly, the court finds that the challenged statutory provision is not narrowly tailored to meet the State's interest in this regard.

## VI. CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment is due to be granted, and defendant's motion for summary judgment is due to be denied. An order

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to the aforementioned "material," which the statute itself distinguishes from devices. *See Williams*, 41 F. Supp. 2d at 1291 n.43.

[190] *See* Plaintiffs' Memorandum in Support (doc. no. 58), at 67.

consistent with this memorandum opinion shall be issued contemporaneously herewith.

DONE this _____ day of October, 2002.

_____

United States District Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-16135

D.C. Docket No. 98-01938-CV-S-NE

SHERRI WILLIAMS, B.J. BAILEY,

*Plaintiffs-Appellees,*

BETTY FAYE HAGGERMAKER, et al.,

*Plaintiffs,*

ALICE JEAN COPE, JANE DOE, DEBORAH L. COOPER, BENNY COOPER, DAN BAILEY, JANE POE, JANE ROE,

*Plaintiffs-Appellees,*

v.

ATTORNEY GENERAL OF ALABAMA,

*Defendant-Appellant,*

TIM MORGAN, in his official capacity as the District Attorney of the County of Madison, Alabama,

*Defendant.*

July 28, 2004

Appeal from the United States District Court for the

Northern District of Alabama

Before BIRCH, BARKETT and HILL, Circuit Judges. BIRCH, Circuit Judge:

In this case, the American Civil Liberties Union ("ACLU")[1] invites us to add a new right to the current catalogue of fundamental rights under the Constitution: a right to sexual privacy. It further asks us to declare Alabama's statute prohibiting the sale of "sex toys" to be an impermissible burden on this right. Alabama responds that the statute exercises a time-honored use of state police power—restricting the sale of sex. We are compelled to agree with Alabama and must decline the ACLU's invitation.

## I. BACKGROUND

Alabama's Anti-Obscenity Enforcement Act prohibits, among other things, the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Ala.Code § 13A-12-200.2 (Supp.2003).

The Alabama statute proscribes a relatively narrow bandwidth of activity. It prohibits only the sale—but not the use, possession, or gratuitous distribution—of sexual devices (in fact, the users involved in this litigation acknowledge that they already possess multiple sex toys). The law does not affect the distribution of a number of other sexual products such as ribbed condoms or virility drugs. Nor does it prohibit Alabama residents from purchasing sexual devices out of state and bringing them back into Alabama. Moreover, the statute permits the sale of ordinary vibrators and body massagers that, although useful as sexual aids, are not "designed or marketed ... primarily" for that particular purpose. *Id.* Finally, the statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." *Id.* § 13A-12-200.4.

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[1] Because the various user appellees and vendor appellees are all represented by the ACLU, the driving force behind this litigation, "the ACLU" will be used to refer collectively to appellees.

This case, which is now before us on appeal for the second time, involves a challenge to the constitutionality of the Alabama statute. The ACLU, on behalf of various individual users and vendors of sexual devices, initially filed suit seeking to enjoin the statute on 29 July 1998, a month after the statute took effect. The ACLU argued that the statute burdens and violates sexual-device users' right to privacy and personal autonomy under the Fourteenth Amendment to the United States Constitution.[2]

Following a bench trial, the district court concluded that there was no currently recognized fundamental right to use sexual devices and declined the ACLU's invitation to create such a right. *Williams v. Pryor,* 41 F.Supp.2d. 1257, 1282-84 (N.D.Ala.1999) (*Williams I*). The district court then proceeded to scrutinize the statute under rational basis review. *Id.* at 1284. Concluding that the statute lacked any rational basis, the district court permanently enjoined its enforcement. *Id.* at 1293.

On appeal, we reversed in part and affirmed in part. *Williams v. Pryor,* 240 F.3d 944 (11th Cir.2001) (*Williams II*). We reversed the district court's conclusion that the statute lacked a rational basis and held that the promotion and preservation of public morality provided a rational basis. *Id.* at 952. However, we affirmed the district court's rejection of the ACLU's *facial* fundamental-rights challenge to the statute. *Id.* at 955. We then remanded the action to the district court for further consideration of the *as-applied* fundamental-rights challenge. *Id.* at 955.

On remand, the district court again struck down the statute. *Williams v. Pryor,* 220 F.Supp.2d 1257 (N.D.Ala.2002) (*Williams III*). On cross motions for summary judgment, the district court held that the statute unconstitutionally burdened the right to use sexual devices within private adult, consensual sexual relationships. *Id.*

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[2] The ACLU also invokes the First, Fourth, Fifth, and Ninth Amendments.

After a lengthy discussion of the history of sex in America, the district court announced a fundamental right to "sexual privacy," which, although unrecognized under any existing Supreme Court precedent, the district court found to be deeply rooted in the history and traditions of our nation. *Id.* at 1296. The district court further found that this right "encompass[es] the right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas" marketed by the vendors involved in this case. *Id.* The district court accordingly applied strict scrutiny to the statute. *Id.* Finding that the statute failed strict scrutiny, the district court granted summary judgment to the ACLU and once again enjoined the statute's enforcement. *Id.* at 1307.

Alabama now appeals that decision. The only question on this appeal is whether the statute, as applied to the involved users and vendors, violates any fundamental right protected under the Constitution.[3] The proper analysis for evaluating this question turns on whether the right asserted by the ACLU falls within the parameters of any presently recognized fundamental right or whether it instead requires us to recognize a hitherto unarticulated fundamental right.

## II. DISCUSSION

We review a summary judgment decision *de novo* and apply the same legal standard used by the district court. *Nat'l Parks Conservation Ass'n v. Norton,* 324 F.3d 1229, 1236 (11th Cir.2003). Our *de novo* review begins with a discussion of the asserted right. Here, we reaffirm our

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[3] As a threshold matter, Alabama also argues that the district court lacked jurisdiction to hear the case because the vendors and users do not have standing to sue. The district court properly concluded that vendors and users have shown a high probability of suffering a legally cognizable injury as result of the statute and thus have demonstrated standing, and we adopt its analysis in this regard. *Williams III,* 220 F.Supp.2d at 1267-73.

conclusion in *Williams II*, 240 F.3d at 954, that no Supreme Court precedents, including the recent decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), are decisive on the question of the existence of such a right. Because the ACLU is asking us to recognize a new fundamental right, we then apply the analysis required by *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). As we explain, we conclude that the asserted right does not clear the *Glucksberg* bar.

**A. Asserted Right**

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." The most familiar function of this Clause is to guarantee procedural fairness in the context of any deprivation of life, liberty, or property by the State. The users and vendors here do not claim to have been denied procedural due process. Instead, they rely on the Due Process Clause's *substantive* component, which courts have long recognized as providing "heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (citation omitted).

> The ACLU argues that the use of sexual devices is among those activities that, although not enumerated in the Constitution, are protected under the concept of substantive due process. According to the ACLU, the State of Alabama, through its prohibition on the commercial distribution of sex toys *qua* sex toys, has intruded into the most intimate of places—the bedrooms of its citizens—and the lawful sexual conduct that occurs therein. While the statute's reach does not directly

> proscribe the sexual conduct in question, it places—without justification—a substantial and undue burden on the ability of the plaintiffs to obtain devices regulated by the statute. By restricting sales of these devices to plaintiffs, Alabama has acted in violation of the fundamental rights of privacy and personal autonomy that protect an individual's lawful sexual practices guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.

*Williams III,* at 1261 (quoting the ACLU's amended complaint).

The ACLU invokes "privacy" and "personal autonomy" as if such phrases were constitutional talismans. In the abstract, however, there is no fundamental right to either. *See, e.g., Glucksberg,* 521 U.S. at 725, 117 S.Ct. at 2270 (fundamental rights are "not simply deduced from abstract concepts of personal autonomy"). Undoubtedly, many fundamental rights currently recognized under Supreme Court precedent touch on matters of personal autonomy and privacy. However, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." *Id.* at 727, 117 S.Ct. at 2271. Such rights have been denominated "fundamental" not simply because they implicate deeply personal and private considerations, but because they have been identified as "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21, 117 S.Ct. at 2268 (internal citations and quotation marks omitted).

Nor, contrary to the ACLU's assertion, have the Supreme Court's substantive-due-process precedents recognized a free-standing "right to sexual privacy." The Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy—and has invariably declined. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n. 5, 97 S.Ct. 2010, 2018 n. 5, 52 L.Ed.2d 675 (1977) (noting that the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults, and we do not purport to answer that question now") (internal citation and punctuation omitted). Although many of the Court's "privacy" decisions have implicated sexual matters, *see, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (abortion); *Carey*, 431 U.S. at 678, 97 S.Ct. at 2010 (contraceptives), the Court has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right.

The Supreme Court's most recent opportunity to recognize a fundamental right to sexual privacy came in *Lawrence v. Texas*, where petitioners and *amici* expressly invited the court to do so.[4] That the *Lawrence* Court had declined the invitation was this court's conclusion in our recent decision in *Lofton v. Sec. of Dept. of Children and Family Servs.*, 358 F.3d 804, 815-16 (11th Cir.2004). In *Lofton*, we addressed in some detail the "question of whether *Lawrence* identified a new fundamental right to private sexual intimacy."[5] *Id.* at 815. We concluded that, although *Lawrence* clearly established the unconstitutionality of

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[4] *See* Tr. of Oral Argument, No. 02-102, at *4; Br. of the ACLU et al. as *Amici Curiae*, No. 02-102, at *11-25.

[5] *See also Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 377 F.3d 1275, 2004 WL 1627022 (11th Cir. July 21, 2004) (Birch, J., specially concurring in denial of rehearing en banc).

criminal prohibitions on consensual adult sodomy, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"—whether to homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy. *Id.* at 817. We noted in particular that the *Lawrence* opinion did not employ fundamental-rights analysis and that it ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute. *Id.* at 816-17.[6]

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[6] *Lofton* stated in relevant part:

> We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis. The Court has noted that it must "exercise the utmost care whenever [it is] asked to break new ground" in the field of fundamental rights, which is precisely what the *Lawrence* petitioners and their *amici curiae* had asked the Court to do. That the Court declined the invitation is apparent from the absence of the "two primary features" of fundamental-rights analysis in its opinion. First, the *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Second, the opinion notably never provides the "'careful description' of the asserted fundamental liberty interest" that is to accompany fundamental-rights analysis. Rather, the constitutional liberty interests on which the Court relied were invoked, not with "careful description," but with sweeping generality. Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds, holding that it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

The dissent seizes on scattered *dicta* from *Lawrence* to argue that *Lawrence* recognized a *substantive* due process right of consenting adults to engage in private intimate sexual conduct, such that all infringements of this right must be subjected to strict scrutiny.[7] As we noted in *Lofton*, we are not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights. *Id.* at 816. Nor are we prepared to

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*Id.* at 816-17 (internal citations omitted).

[7] The dissent argues that certain declarations of the *Lawrence* Court signal a fundamental right, for example: "the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person," *Lawrence*, 123 S.Ct. at 2477 (emphasis added); dissent at 1253; and that "liberty gives substantial protection to adult persons in deciding how to *conduct their private lives in matters pertaining to sex*," *id.* at 2480 (emphasis added); dissent at 1259. However, neither of these quoted excerpts from *Lawrence* support such a broad proposition when read in context. The first quotation comes from the *Lawrence* Court's synopsis of *Roe*, which it mentioned in its survey of the privacy cases preceding *Bowers*. 123 S.Ct. at 2477 ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."). The second comes from the Court's discussion of how *Bowers* overstated the legal and historical condemnation of homosexual conduct, failing to recognize the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 2480 ("This emerging recognition should have been apparent when *Bowers* was decided.").

It is telling that the best support for the fundamental-right-to-sexual-intimacy interpretation of *Lawrence* must be assembled from bits of *dicta*. It is equally telling the dissent cites no language from the opinion—much less language articulating a rule of law—that states with any precision the right that *Lawrence* purportedly held to exist, or the standard of review that it triggers. Instead, the dissent characterizes our analysis as "demeaning and dismissive" yet fares little better in its attempt to overstate the effect of the Alabama law on the day-to-day sexual activities of consenting adults in their homes.

assume that *Glucksberg*—a precedent that *Lawrence* never once mentions—is overruled by implication.

The dissent in turn argues that the right recognized in *Lawrence* was a longstanding right that preexisted *Lawrence,* thus obviating the need for any *Glucksberg*-type fundamental rights analysis. But the dissent never identifies the source, textual or precedential, of such a preexisting right to sexual privacy. It does cite *Griswold, Eisenstadt, Roe*, and *Carey.* However, although these precedents recognize various substantive rights *closely related* to sexual intimacy, none of them recognize the overarching right to sexual privacy asserted here. *Griswold* (marital privacy and contraceptives); *Eisenstadt* (equal protection extension of *Griswold*); *Roe* (abortion); *Carey* (contraceptives). As we noted above, in the most recent of these decisions, *Carey,* the Court specifically observed that it had not answered the question of whether there is a constitutional right to private sexual conduct.[8] 431

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[8] Contrary to the dissent's accusation that "[t]he majority refuses ... to acknowledge *why* the Court in *Lawrence* held that criminal prohibitions on consensual sodomy are unconstitutional," we have refused to do no such thing. What we have refused to do, as we suggest the dissent has done, is to create a rationale that was not articulated as to the "why" for the ruling. The operative legal conclusion that we come to as a basis for the decision in *Lawrence* is that Texas's sodomy prohibition did not further a legitimate state interest. *Lawrence,* 539 U.S. 558, 123 S.Ct. 2472, 2484, 156 L.Ed.2d 508; *Lofton v. Sec. of Dep't of Children and Family Servs.,* 358 F.3d 804 (11th Cir.2004) (Birch, J., specially concurring in denial of rehearing en banc). We appreciate that the dissent does not agree with our analysis, but we have not "refused" to answer the dissent's question—notably, nobody else in the litigation has posed the question.

The dissent also flatly states that the *Lawrence* Court rejected public morality as a legitimate state interest that can justify criminalizing private consensual sexual conduct, but this conclusion ignores the obvious difference in what this statute forbids and the prohibitions of the Texas statute. There is nothing "private" or "consensual" about the advertising and sale of a dildo. And such advertising and sale is just as likely to be exhibited to children as to "consenting adults." Moreover, the Supreme Court has noted on repeated occasions that laws can be based

U.S. at 688 n. 5, 97 S.Ct. at 2018 n. 5. Moreover, nearly two decades later, the *Glucksberg* Court, listing the current catalog of fundamental rights, did not include such a right. 521 U.S. at 720, 117 S.Ct. at 2267.

In short, we decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that

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on moral judgments. *See Barnes v. Glen Theatre*, 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (upholding a public indecency statute, stating, "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation"); *id.* (noting that "a legislature could legitimately act ... to protect 'the social interest in order and morality'") (citation omission); *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859 (1976) (plurality opinion) (upholding the death penalty, noting that "capital punishment is an expression of society's moral outrage at particularly offensive conduct"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973) (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act ... to protect 'the social interest in order and morality'") (quoting *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957)); *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (noting that "criminal punishment usually represents the moral condemnation of the community"). In addition, our own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest. *See, e.g., Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir.2001) ("The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."); *see also id.* at 949 n. 3 ("In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases."). One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale (with all due respect to Justice Scalia's ominous dissent notwithstanding).

never invoked strict scrutiny. Moreover, it would be answering questions that the *Lawrence* Court appears to have left for another day. Of course, the Court may in due course expand *Lawrence*'s precedent in the direction anticipated by the dissent. But for us preemptively to take that step would exceed our mandate as a lower court.[9]

**B. Glucksberg Analysis**

Because the ACLU is seeking recognition of a right neither mentioned in the Constitution nor encompassed within the reach of the Supreme Court's existing fundamental-right precedents, we must turn to the two-step analytical framework that the Court has established for evaluating new fundamental-rights claims. *See Glucksberg,* 521 U.S. at 720-21, 117 S.Ct. at 2268. First, in analyzing a request for recognition of a new fundamental right, or extension of an existing one, we "must begin with a careful description of the asserted right." *Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993); *see also Glucksberg,* 521 U.S. at 721, 117 S.Ct. at 2268. Second, and most critically, we must determine whether this asserted right, carefully described, is one of "those fundamental rights

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[9] The dissent indicates that "even under the majority's own constrained interpretation of *Lawrence,* we are, at a bare minimum, obliged to revisit [our] previous conclusion in *Williams v. Pryor,* 240 F.3d 944 (11th Cir.2001) ('*Williams II*')" that this law has a rational basis in light of *Lawrence*'s overruling of *Bowers* and our reliance in *Williams II* "on the now defunct *Bowers* to conclude that public morality provides a legitimate state interest." Dissent at 1259. We agree with the dissent that, on remand, the district court, after considering the appropriate submissions of the parties, may examine "whether our holding in *Williams II* that Alabama's law has a rational basis (e.g., public morality) remains good law now that *Bowers* has been overruled." *Id.* at 1259, n. 25. We save for a later day consideration of whether Justice Scalia's (perhaps ominous) predication that public morality may no longer serve as a rational basis for legislation after *Lawrence.*

and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. at 2268 (internal citations and quotation marks omitted).

This analysis, as the Supreme Court has stressed, must proceed with "utmost care" because of the dangers inherent in the process of elevating extra-textual rights to constitutional status, thereby removing them from the democratic field of play:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

*Id.* at 720, 117 S.Ct. at 2267-68 (internal citations and quotation marks omitted). The mandate to proceed carefully applies with added force when venturing into terrain where the Supreme Court itself has tread lightly, as it has here. As we explain, the district court failed to exercise this "utmost care" in conducting the two-pronged *Glucksberg* analysis.

**1. Careful Description**

As we noted in *Williams II*, the district court's initial opinion "narrowly framed the analysis as the question whether the concept of a constitutionally protected right to privacy protects an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity." 240 F.3d at 953 (internal quotation marks omitted). On appeal, we

affirmed this formulation, stating that "the district court correctly framed the fundamental rights analysis in this case." *Id.* However, on remand, the district court abandoned its initial, careful framing of the issue and instead characterized the asserted right more broadly as a generalized "right to sexual privacy." *Williams III,* 220 F.Supp.2d at 1277 (emphasis omitted).[10]

In searching for, and ultimately finding, this right to sexual privacy, the district court did little to define its scope and bounds. As formulated by the district court, the right potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited. At oral arguments, the ACLU contended that "no responsible counsel" would challenge prohibitions such as those against pederasty and adult incest under a "right to sexual privacy" theory. However, mere faith in the responsibility of the bar scarcely provides a legally cognizable, or constitutionally significant, limiting principle in applying the right in future cases.[11]

The sole limitation provided by the district court's ruling was that the right would extend only to *consenting adults. Id.* at 1294. The consenting-adult formula, of course, is a corollary to John Stuart Mill's celebrated "harm

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[10] Although our *Williams II* opinion indicated from the outset that the district court's initial narrow framing of the right was the proper approach, 240 F.3d at 953, we note that it created a degree of ambiguity by making a subsequent shorthand reference to this right as "a fundamental right to sexual privacy," *id.* at 955. It appears that this imprecision in our language was, at least in part, the source of the district court's over-broad framing of the right on remand. *Williams III,* 220 F.Supp.2d at 1276.

[11] As Thomas Jefferson noted, "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." Thomas Jefferson, *Draft Kentucky Resolutions,* 1798. Although usually invoked in slightly different contexts, this principle—that, in our republican system, we do not entrust constitutional limitations to human good will or self-restraint—has equal force here.

principle," which would allow the state to proscribe only conduct that causes identifiable harm to another. *See generally* John Stuart Mill, *On Liberty* (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859). Regardless of its force as a policy argument, however, it does not translate *ipse dixit* into a constitutionally cognizable standard. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 68, 93 S.Ct. 2628, 2641, 37 L.Ed.2d 446 (1973) ("[F]or us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.").

If we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults. *See, e.g., id.* at 68 n. 15, 93 S.Ct. at 2641 n. 15 ("The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.'"). This in turn would require us to subject all infringements on such activities to strict scrutiny. *Glucksberg,* 521 U.S. at 721, 117 S.Ct. at 2268. In short, by framing our inquiry so broadly as to look for a general right to sexual intimacy, we would be answering many questions not before us on the present facts.

Indeed, the requirement of a "careful description" is designed to prevent the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand. *See Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). One of "the cardinal rules" of constitutional jurisprudence is that the scope of the asserted right—and thus the parameters of the inquiry—must be dictated "by the precise facts" of the immediate case. *Id.; see also Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 277-78, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990) ("[I]n deciding a question of such

magnitude and importance it is the better part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.") (citation and internal punctuation omitted).

*Glucksberg* and *Flores,* cases in which the Court was asked to expand certain substantive due process rights, are instructive examples. In *Glucksberg,* the lower court and the petitioners had variously characterized the asserted right as "a liberty interest in determining the time and manner of one's death," 521 U.S. at 722, 117 S.Ct. at 2269, "a liberty to choose how to die and a right to control one's final days," *id.,* and the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference," *id.* at 724, 117 S.Ct. at 2269. The Court rejected these characterizations as overbroad, noting its "tradition of carefully formulating the interest at stake in substantive-due-process cases." *Id.* at 722, 117 S.Ct. at 2269. Then, looking to the specific statute under challenge—a ban on assisted suicide—the Court recast the asserted right as "a right to commit suicide which itself includes a right to assistance in doing so," *id.,* or as "a right to commit suicide with another's assistance," *id.* at 724, 117 S.Ct. at 2269.

Under challenge in *Flores* was an immigration regulation that governed the detention and release of alien juveniles. 507 U.S. at 294-98, 113 S.Ct. at 1443-45. The respondents, a class of detained alien juveniles, argued that the regulation violated their "fundamental right to freedom from physical restraint." *Id.* at 299, 113 S.Ct. at 1446 (internal quotation marks omitted). The Supreme Court, emphasizing the importance of beginning substantive-due-process analysis with a "careful description," rejected respondents' broad formulation of the implicated liberty interests. 507 U.S. at 302, 113 S.Ct. at 1447. The Court then restated the putative right—by careful reference to the challenged regulation:

> The "freedom from physical restraint"

> invoked by respondents is not at issue in this case.... Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives: The challenged regulation requires such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government- selected child-care institution.

*Id.* (internal citations omitted).

As in *Glucksberg* and *Flores*, the scope of the liberty interest at stake here must be defined in reference to the scope of the Alabama statute. We begin by observing that the broad rights to "privacy" and "sexual privacy" invoked by the ACLU are not at issue. The statute invades the privacy of Alabama residents in their bedrooms no more than does any statute restricting the availability of commercial products for use in private quarters as sexual enhancements.[12] Instead, the challenged Alabama statute bans the commercial

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[12] The mere fact that a product is used within the privacy of the bedroom, or that it enhances intimate conduct, does not in itself bring the use of that article within the right to privacy. If it were otherwise, individuals whose sexual gratification requires other types of material or instrumentalities—perhaps hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute—likewise would have a colorable argument that prohibitions on such activities and materials interfere with their privacy in the bedchamber. Under this theory, all such sexual-enhancement paraphernalia (as long as it was used only in consensual encounters between adults) would also be encompassed within the right to privacy—and any burden thereon subject to strict scrutiny.

distribution of sexual devices.[13] At a minimum, therefore, the putative right at issue is the right to sell and purchase sexual devices.

It is more than that, however. For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. Thus it was that the *Glucksberg* Court analyzed a ban on *providing* suicide assistance as a burden on the right to *receive* suicide assistance. 521 U.S. at 723, 117 S.Ct. at 2269. Similarly, prohibitions on the *sale* of contraceptives have been analyzed as burdens on the *use* of contraceptives. *Carey,* 431 U.S. at 688, 97 S.Ct. at 2018 ("[T]he same test must be applied to state regulations that burden an individual's right ... by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely."). Because a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.

**2. "History and Tradition" and "Implicit in the Concept of Ordered Liberty"**

With this "careful description" in mind, we turn now to the second prong of the fundamental-rights inquiry. The crucial inquiry under this prong is whether the right to use sexual devices when engaging in lawful, private sexual activity is (1) "objectively, deeply rooted in this Nation's

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[13] Advocating that public morality should no longer be a "rational basis to restrict private sexual activity," the dissent seeks to ignore that the legislation at issue bans by its express terms only the unsavory advertising and sale of sexual devices that the majority of the people of Alabama may well find morally offensive. The fact remains that the complainants here continue to possess and use such devices, burdened only by inconvenient access.

history and tradition" and (2) "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg,* 521 U.S. at 721, 117 S.Ct. at 2268 (citations omitted). Although the district court never addressed the second part of this inquiry, it answered the "history and tradition" question in the affirmative.

We find that the district court, in reaching this conclusion, erred on four levels. The first error relates back to the district court's over-broad framing of the asserted right in question. Having framed the relevant right as a generalized "right to sexual privacy," the district court's history and tradition analysis consisted largely of an irrelevant exploration of the history of sex in America. Second, we find that this analysis placed too much weight on contemporary practice and attitudes with respect to sexual conduct and sexual devices. Third, rather than look for a history and tradition of *protection* of the asserted right, the district court asked whether there was a history and tradition of state *non-interference* with the right. Finally, we find that the district court's uncritical reliance on certain expert declarations in interpreting the historical record was flawed and that its reliance on certain putative "concessions" was unfounded.

**a. The Scope of the District Court's History and Tradition Analysis**

The district court began its *Glucksberg*-mandated history and tradition inquiry by defining its task as one of determining whether to "recognize a fundamental right to sexual privacy." *Williams III,* 220 F.Supp.2d at 1277. After an extensive survey of the history of sex in American culture and law—replete with cites to the Kinsey studies and Michel Foucault—the district court concluded that "there exists a constitutionally inherent right to sexual privacy that firmly encompasses state non-interference with private, adult,

consensual sexual relationships." *Id.* at 1296. As examined above, the Supreme Court's own reticence in this area, and its admonition to carefully define the right at stake, convince us that the district court erred in undertaking to find a generalized "right to sexual privacy." Given this over-broad starting point, the district court's subsequent inquiry, predictably, was likewise broader than called for by the facts of the case. The inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of *sexual devices* within that history and tradition.

**b. The District Court's Focus on "Contemporary Practice"**

In reaching its holding, the district court relied heavily on "contemporary practice," emphasizing the "contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity." *Id.* at 1294; *see generally id.* at 1289-94; *see also id.* at 1296 (holding that "there is a 'history, legal tradition, and practice' in this country of deliberate state non-interference with private sexual relationships between married couples, and a *contemporary practice* of the same between unmarried persons") (emphasis added) (citation omitted).

Our first concern is the legal significance, or the lack thereof, of much of the district court's source material for this contemporary practice. In addition to invoking a cluster of Supreme Court precedents touching on matters of procreation and familial integrity, the district court looked to social science data respecting premarital intercourse, marriage and divorce rates, and the like. *Id.* at 1290. It further noted the revolutionary impact of the Kinsey studies, the "imagery and implements of adult sexual relationships [that] pervade modern American society," the availability of "pornography of the grossest sort," and the "widespread marketing of Viagra (including by such notable personalities

as former United States Senate Majority Leader and 1996 Republican presidential candidate Robert J. Dole and popular NASCAR driver Mark Martin)." *Id.* at 1294. While such evidence undoubtedly confirms the district court's discovery of "the specter of a twentieth century sexual liberalism," *id.* at 1291, its relevance under *Glucksberg* is scant.

The district court justified this emphasis by noting that the *Glucksberg* Court had relied on contemporary practice in reaching its determination that assisted suicide is not a constitutional right. *See, e.g., id.* at 1275 (*Glucksberg* "considered current statutes, legislative debates, voter initiatives, and the positions of contemporary task forces and commissions on the issue of assisted suicide"). This gloss, however, considerably overstates that Court's reliance on contemporary attitudes. What the *Glucksberg* Court did was to note that democratic action in many states had recently reaffirmed assisted-suicide bans, thus buttressing the Court's conclusion that assisted suicide is not deeply rooted in the history and traditions of the nation. 521 U.S. at 716-19, 117 S.Ct. at 2265-67. But the existence of this contemporary practice was never essential to that conclusion. That is, the Court never suggested that a lack of contemporary *reinforcement* of the prohibition on assisted suicide would have led it to a contrary conclusion.

The district court's interpretation also overlooks the context of *Glucksberg*'s contemporary practice analysis. The Court began its examination of history and tradition by inquiring "whether this asserted right has *any place* in our Nation's traditions." *Id.* at 723, 117 S.Ct. at 2269 (emphasis added). Having found that it did not, the Court had no need to proceed to the further question of whether that right was *deeply rooted* in those traditions (nor whether it was "implicit in the concept of ordered liberty"). Part of the reason the Court was able to dismiss the asserted right so summarily was because it found that the prohibition on assisted suicide "continues explicitly" to the present. *Id.* In

short, the democratic action cited by *Glucksberg* was merely one factor among many disproving the claim that assisted suicide is a "deeply rooted" right.[14]

### c. The District Court's Faulty Equation of Historical Non-Interference with Historical Protection

The district court's central holding—its discovery of a constitutional "right to use sexual devices like ... vibrators, dildos, anal beads, and artificial vaginas"—was not based on any evidence of a history and tradition of *affirmative protection* of this right. *Williams III,* 220 F.Supp.2d at 1296. The district court's lengthy opinion cites no reference to such a right in the usual repositories of our freedoms, such as federal and state constitutional provisions, constitutional doctrines, statutory provisions, common-law doctrines, and the like. Instead, the critical evidence for the district court was the relative scarcity of statutes explicitly banning sexual devices and the rarity of reported cases of sexual-devices prosecutions—along with various factual assertions from declarations by the ACLU's experts. From this, the district court inferred "that history and contemporary practice demonstrate a conscious avoidance of regulation of [sexual] devices by the states." *Id.* at 1296.

This negative inference essentially inverted *Glucksberg*'s history and tradition inquiry. *Glucksberg,* 521

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[14] The focus on the trajectory of contemporary practice ultimately proves too much. The fact that there is an emerging consensus scarcely provides justification for the courts, who often serve as an antimajoritarian seawall, to be swept up with the tide of popular culture. If anything, it is added reason for us to permit the democratic process to take its course. *See, e.g., Glucksberg,* 521 U.S. at 735, 117 S.Ct. at 2275 ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

U.S. at 721, 117 S.Ct. at 2268. The district court—rather than requiring a showing that the right to use sexual devices is "deeply rooted in this Nation's history and tradition," *id.*—looked for a showing that *proscriptions* against sexual devices are deeply rooted in history and tradition. Under this approach, the freedom to smoke, to pollute, to engage in private discrimination, to commit marital rape—at one time or another—all could have been elevated to fundamental-rights status. Moreover, it would create the perverse incentive for legislatures to regulate every area within their plenary power for fear that their restraint in any area might give rise to a right of constitutional proportions.

Beyond these obvious objections, the most significant flaw in the district court's analysis is its misreading of *Glucksberg*. Admittedly, the *Glucksberg* Court, in declining to extend constitutional protection to assisted suicide, cited the extensive history of laws forbidding or discouraging suicide. But the context of this inquiry was the Court's attempt to determine whether a right to suicide, and particularly assisted suicide, was deeply rooted in American history and tradition. Naturally, prohibitions on suicide were particularly competent evidence of the absence of such a history and tradition. The *Glucksberg* Court, however, never suggested that the reviewing court must find a history of proscription of a given activity before declining to recognize a new constitutional right to engage in that activity. *Id.* at 710-16, 117 S.Ct. at 2262-65; *see also id.* at 725, 117 S.Ct. at 2270 (rejecting the analogy between the constitutionally-protected right to refuse unwanted medical treatment and the asserted right to assisted suicide, noting that the former right "has never enjoyed similar legal protection").

In short, nothing in *Glucksberg* indicates that an absence of historical *prohibition* is tantamount, for purposes of fundamental-rights analysis, to an historical record of *protection* under the law. To the contrary, the *Glucksberg* standard expressly requires a showing that the asserted right is "deeply rooted in this Nation's history and tradition" and

"implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Id.* at 721, 117 S.Ct. at 2268. Not only does the record before us fail to evidence such a deeply rooted right, but it suggests that, to the extent that sex toys historically have attracted the attention of the law, it has been in the context of proscription, not protection.

The chief example of this proscription is the "Comstock Laws," federal and state legislation adopted in the late 1800s. The federal Comstock Act of 1873 was a criminal statute directed at "the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use." *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70, 103 S.Ct. 2875, 2882, 77 L.Ed.2d 469 (1983) (quoting Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873)). The Act prohibited importation of and use of the mails for transporting, among other things, "every article or thing intended or adapted for any indecent or immoral use." *United States v. Chase,* 135 U.S. 255, 257, 10 S.Ct. 756, 756, 34 L.Ed. 117 (1890). Various states also enacted similar statutes prohibiting the sale of such articles. *See, e.g.,* Conn. Gen. Stat. § 1325 (1902); Mass. Gen. Laws Ann. ch. 272 § 21 (West 2004) (passed 1879).

The district court, however, discounted the significance of the Comstock laws, describing them as "aberrant to the sexual privacy" generally afforded to consensual, adult sexual conduct. *Williams III,* 220 F.Supp.2d. at 1286. The district court cited expert declarations offered by the ACLU to the effect that the Comstock laws were not motivated primarily by a desire to ban sexual devices. *Id.* The district court further noted that searches of the annotations to the Comstock Act and of *Federal Cases* found no references to cases involving dildos and vibrators. *Id.* at 1287.

Even if these prohibitions on sexual devices were not widespread or vigorously enforced, their mere existence significantly undermines the argument that sexual devices

historically have been free from state interference. Moreover, the lack of statutory references to sexual devices is relatively meaningless without evidence that commerce in these devices was sufficiently widespread, or sufficiently in the public eye, to merit legislative attention, at least beyond general anti-obscenity laws. Likewise, the focus on searches of federal case reporters for references to "vibrators" or "dildos" assumes, unjustifiably, that reported cases are reliable proxies for actual prosecutions, the vast majority of which would have never appeared in the court reporters (it also overlooks the possibility of prosecutions under *state* law). It also overlooks the possibility that traditional sensibilities and mores restrained courts from explicitly mentioning particular sexual devices in the text of judicial opinions.

In light of these realities, the negative inference drawn by the district court—that the scarcity of explicit reference to sexual devices in statutory schemes and reported cases reflects a "deliberate non-interference," *id.* at 1286—is too speculative a basis for constitutionalizing a hitherto unrecognized right. This is especially true given the lack of any indicia of affirmative protection under the law. In short, there is no competent evidence in the record before us indicating that the lack of explicit and aggressive proscription of sex toys was, as the district court surmised, "conscious avoidance of regulation of these devices by the states." *Id.* at 1296.

**d. The District Court's Handling of the Record**

**i. The District Court's Reliance on the ACLU's Expert Declarations**

Finally, we note our recognition of the district court's uncritical acceptance of the bare assertions contained in the ACLU's expert declarations—particularly in reaching

conclusions outside, or even in apparent contradiction to, the documented historical record.

This perfunctory reliance was especially pronounced in the district court's deconstruction of the Comstock laws. The mere existence of both federal and state Comstock laws—especially the federal Comstock Act, which expressly prohibited importation and mail transport of "every article ... for ... immoral use"—seriously undermines the ACLU's fundamental-rights argument under Glucksberg. Instead, the district court's review of the Comstock laws led it to the conclusion that "[t]he popularity, legality, and ease of access to sexual devices like vibrators and dildos further demonstrate that the firm legislative respect for sexual privacy in the marital relationship extended to deliberate non-interference with adults' use of sexual devices within those relationships." *Id.* at 1286.

The sole support for this rather cursory conclusion appears to have been the assertions of one Rachel Maines, an historian and author, who submitted two separate expert declarations on the ACLU's behalf. R3-56, Ex. A; R4-84, Ex. 4. Her declarations offered criticism of the Alabama statute going well beyond her specific expertise and delving into the legal and policy dimensions of the case:

> Laws like Alabama's that target the appearance, packaging or marketing of [sexual] devices, rather than their functionality, thus do not prevent or mitigate the supposed "evil" of "commerce of sexual stimulation and auto-eroticism, for its own sake" (Brief of Alabama Attorney General, 21). Their effect is merely to benefit one set of retailers (drug stores, health food stores, and discount houses such as Walmart, GNC and Target) at the expense of another (marital aids vendors).

R3-56, Ex. A at 18-21.

> On the historical record, if devices "designed or marketed as useful primarily for the stimulation of the human genital organs" represent an evil and/or a moral threat to the citizens of Alabama, the state has been remarkably dilatory in making this discovery, having waited for something more than two and a half millennia from the invention of the dildo and more than a century from the invention of the electromechanical vibrator to legislate against them. Apparently unconcerned about the availability of vibrators to consumers beginning in 1899, and even about their use in the production of orgasm in women, for which there was ample evidence by 1930, the state did not act against these devices until a small percentage of them took on anatomical forms, and until they began to be associated with a new interest in orgasmic mutuality in heterosexual relationships. Significantly, Viagra, which enhances sexual experience for men but not necessarily for women, is legal by prescription in all states, including those with laws against vibrators and dildos. As an historian and as a citizen, I fail to see what legitimate purpose is served by institutionalizing an hypocrisy in which the sale of a standard and traditional therapeutic device is rendered unlawful by sexual references in appearance, packaging or marketing.

*Id.* at 23-25.

Although Maines's statements suggest an agenda inconsistent with an unbiased and complete historical presentation, the district court nevertheless repeatedly relied on her factual assertions, usually without any independent verification. We note several typical examples:

- In downplaying the historical significance of the Comstock laws, the district court emphasized that "sexual devices were not the impetus for the so-called Comstock Acts." *Williams III,* 220 F.Supp.2d at 1286. The only support for this statement was Maines's declaration statement that "vibrators and dildoes [sic] were not significant motivations for the passage and enforcement of the Comstock Act." R4-84, Ex. 4 at 2. However, we find in neither Maines's declaration nor the record elsewhere any evidence—aside from Maines's bare assertion—of the actual motivation behind passage and enforcement of the Act.

- The record before the district court contained evidence that, according to records maintained by the New York Society for the Suppression of Vice, between 1871 and 1881, some 64,836 "Articles of immoral use, of rubber, etc." were seized under the Comstock Act and other anti-vice laws. *See* Anthony Comstock, *Traps for the Young* 137 (Robert Bremner ed., Harvard University Press 1967) (1884). The district court, however, dismissed this evidence by quoting Maines's claim that these "were almost all contraceptives." *Williams III,* 220 F.Supp.2d at 1286; R4-84, Ex. 4 at 3. Although our own review of the record confirms that the articles "of rubber" likely represented many condoms, our concern is the district court's casual dismissal of contemporaneous documentary evidence in favor of retrospective, and

unsupported, characterizations of that evidence. Further, although Maines cited several authorities for her assertion, our review of her sources finds no support for the conclusion that the referenced articles "were almost all contraceptives."[15]

- The district court's central holding—its discovery of a constitutional "right to use sexual devices like ... vibrators, dildos, anal beads, and artificial vaginas"—was based largely on unsupported statements from Maines's declarations. *Williams III,* 220 F.Supp.2d at 1296. In divining this right, the district court concluded "that history and contemporary practice demonstrate a conscious avoidance of regulation of [sexual] devices by the states," *Id.* This conclusion was based on the "emergence and widespread acceptance" of the electric vibrator, *id.* at 1283, and "[t]he popularity, legality, and ease of access to sexual devices like vibrators and dildos," *id.* at 1286. These findings in turn relied on Maines's declarations, particularly her assertion that "[v]ibrators remained legal throughout this period, and were mailable matter under the Comstock laws of 1873—1914." *Id.* What both Maines's declaration and the district court's opinion omit is the fact that, according to Maines's own writings elsewhere, the vibrators available on the market during this period were general purpose vibrators marketed for non-sexual uses, such as massaging the hands, face, back,

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[15] Heywood Broun & Margaret Leech, *Anthony Comstock* 92, 153 (1927); Charles G. Trumbull, *Anthony Comstock, Fighter* (1913); Anthony Comstock, *Traps for the Young* 137 (Robert Bremner ed., Belknap Press of Harvard Univ. Press 1967) (1884). Because Maines's did not provide a pinpoint citation for the Trumbull book, we did not review every page of the book, but our review of the relevant portions of the book did not reveal any support for Maines's assertion.

and neck.[16] The fact that these general purpose vibrators were legal and mailable is hardly probative of the legality of sexual devices as sexual devices.

Because of our conclusion *supra* that the constitutionality of Alabama's statute does not hinge on the enforcement, or lack thereof, of the Comstock laws, any error by the district court in its incorporation of Maines's litigation-motivated and litigation-tailored assertions was harmless. Nevertheless, the district court's truth-seeking duties should have compelled it to go behind Maines's assertions and satisfy itself of their reliability before relying

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[16] Maines, in her writing outside the context of this litigation, notes that the first evidence of the availability of mass-market vibrators appears in 1899. Rachel Maines, *The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction* 100 (1999). Significantly, she states that most of these early "home vibrators" were marketed as health and beauty aids, particularly for home massage. *Id.* at 19-20. Consistent with this theory are the turn-of-the-century vibrator advertisements included with Maines's declaration, none of which suggest any sexual use for the devices. R3-56, Ex. A at 19-24. Even if, as Maines contends, there was some wink-and-nod encryption in these advertisements, this hardly supports the district court's conclusion that sexual devices *qua* sexual devices were widely available and openly marketed during this period. *Id.; see also* Rachel Maines, *Socially Camouflaged Technologies: The Case of the Electromagnetic Vibrator,* TECH. AND SOC'Y MAGAZINE, June 1989, at 3. Indeed, Maines further asserts that "[t]he social camouflage of the vibrator as a home and professional medical instrument seems to have remained more or less intact until the end of the 1920s" and that it was not until the vibrator reemerged in 1960s and 70s that "it was openly marketed as a sex aid." Maines, *The Technology of Orgasm,* at 20.

Thus, according to Maines's own book, vibrators have been available to the general public for only slightly over a century and—contrary to the district court's interpretation of Maines's declarations—explicitly sexually-oriented vibrators have been widely available and accepted for only the past four decades, at most.

on those assertions in recognizing a new fundamental constitutional right.[17]

Moreover, this uncritical reliance on Maines's assertions appears to have been typical of a larger pattern. For example, the district court's history and tradition discussion was largely a paraphrased version of the ACLU's motion for summary judgment and its factual support appears to have consisted entirely of the ACLU's pleadings and selective appendices of historical interpretations of sex throughout American history. Of the 104 supporting footnotes in the district court's history and tradition analysis, 99 were citations to these pleadings and appendices.

### ii. The District Court's Reliance on Alabama's "Concessions"

The district court's rationale for its wholesale adoption of the ACLU's evidence appears to have been its mistaken view that the Alabama Attorney General had conceded the ACLU's evidence on the history and tradition question. The district court, as preface to its *Glucksberg* history and tradition analysis, stated that "the court notes that it is extremely significant, if not dispositive, that the Attorney General concedes that 'there is little evidence to show that sexual devices, or consensual sexual activities in general, have historically been subject to governmental regulation.' " *Williams III,* 220 F.Supp.2d. at 1277 (quoting Attorney General's Memorandum in Support of Motion for Summary Judgment, at 16).

This not only misquoted the Attorney General's actual language, but mischaracterized it as a "concession." In his memorandum supporting his motion for summary

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[17] Moreover, in granting summary judgment to the ACLU, the district court was obligated to view all evidence and factual inferences in the light most favorable to Alabama. *Nat'l Parks Conservation Ass'n v. Norton,* 324 F.3d 1229, 1236 (11th Cir.2003).

judgment, the Attorney General had devoted a section to describing Victorian-era proscriptions, and enforcement thereof, on sexual devices. R3-78 at 14-16. The following section began, "Although there is little *additional* evidence to show that sexual devices, or consensual sexual activities in general, have historically been subject to governmental regulation, there is also no evidence to show that these activities have been specially protected under the law." *Id.* at 16 (emphasis added). That section went on to mention some of that "additional evidence," such as efforts by the states to restrict sexual devices. *Id.* The district court's omission of the critical word "additional," as well as its out-of-context quotation of a prefatory dependent clause, significantly altered the meaning of a statement that, in proper context, appears in no way to have been intended as a concession of one of the most significant and contested issues in the case.

Similarly, the district court elsewhere stated: "The Attorney General concedes that 'there is no genuine dispute as to the historical chronology set forth by the plaintiffs' experts,' to the effect that there is a 'history or tradition of state non-interference in persons sex lives.'" *Williams III,* 220 F.Supp.2d. at 1276 (quoting Attorney General's Memorandum in Support of Motion for Summary Judgment, at 16).

In fact, the Attorney General conceded only to the *historical chronology* set forth by the ACLU's experts and the liberalization of attitudes towards sex that this chronology demonstrated. R3-78 at 12. However, the Attorney General never conceded a "history or tradition of state non-interference in persons sex lives." Significantly, the Attorney General's use of that phrase appeared four sentences prior to the "chronology" concession and itself was part of a sentence disputing the ACLU's version of history and tradition: "In attempting to demonstrate a 'history' or 'tradition' of state non-interference in persons' sex lives, [the ACLU's] experts have proffered a lengthy history of sexuality." *Id.* The district court's omission of the

quotation marks surrounding "history" and "tradition" particularly distorted the Attorney General's meaning.

The district court's reliance on these "concessions" appears to have been substantial. In announcing its holding that the ACLU's evidence demonstrated a fundamental right to sexual privacy, the district court stressed that "[t]he Attorney General has conceded plaintiffs' evidence in this regard." *Williams III*, 220 F.Supp.2d. at 1294; *see also id.* at 1295 ("Given the breadth, depth, volume, and weight of that evidence, and the Attorney General's concession, this court is compelled to agree [with plaintiffs-appellees]."); *id.* at 1295-96 (holding that, in light of the ACLU's evidence "and the concession to this evidence by the Attorney General, this court concludes that plaintiffs have met their burden").

To the contrary, the Attorney General's pleadings, while not disputing much of the ACLU's evidence about the liberalization of sexual norms, vigorously disputed both (a) the legal ramifications of that liberalization (e.g., that this liberalization, in itself, satisfied the fundamental-rights threshold) as well as (b) the contention that sexual devices had gone virtually unregulated throughout American history. R3-78 at 12-20. We conclude, however, that the district court's reliance on these putative concessions was, at worst, harmless error. The issues that the district court treated as having been conceded pertained to the existence of a fundamental right to sexual privacy, which, as we explained *supra*, was an over-broad framing of the inquiry in the first place.

## III. CONCLUSION

Hunting expeditions that seek trophy game in the fundamental-rights forest must heed the maxim "look before you shoot." Such excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive—our republican democracy. Once elevated to constitutional status, a right is effectively removed from the hands of the

people and placed into the guardianship of unelected judges. *See Glucksberg,* 521 U.S. at 720, 117 S.Ct. at 2267-68. We are particularly mindful of this fact in the delicate area of morals legislation. One of the virtues of the democratic process is that, unlike the judicial process, it need not take matters to their logical conclusion. If the people of Alabama in time decide that a prohibition on sex toys is misguided, or ineffective, or just plain silly, they can repeal the law and be finished with the matter. On the other hand, if we today craft a new fundamental right by which to invalidate the law, we would be bound to give that right full force and effect in all future cases—including, for example, those involving adult incest, prostitution, obscenity, and the like.

The dissent eloquently quotes Justice Brandeis in its opening passages. We find merit in the wisdom of Justice Felix Frankfurter in his concurring opinion in *Dennis v. United States,* 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951), when he observed:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.... Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

For the reasons we have explained, we hold that the district court committed reversible error in concluding that the Due Process Clause "encompass[es] a right to use sexual devices like ... vibrators, dildos, anal beads, and artificial vaginas." *Williams III,* 220 F.Supp.2d. at 1296. Moreover, we reject the ACLU's request that we redefine the constitutional right to privacy to cover the commercial

distribution of sex toys. We REVERSE the district court's grant of the ACLU's motion for summary judgment and REMAND to the district court for further proceedings consistent with this opinion.

BARKETT, Circuit Judge, dissenting:

The majority's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity. These premises directly conflict with the Supreme Court's holding in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

This case is not, as the majority's demeaning and dismissive analysis suggests, about sex or about sexual devices. It is about the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships. As Justice Brandeis stated in the now famous words of his dissent in *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), when "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness ... [t]hey conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 277 U.S. at 478, 48 S.Ct. 564 (Brandeis, J., dissenting) *overruled by Berger v. State of New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The majority claims that *Lawrence,* like *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), failed to recognize the substantive due process right of consenting adults to engage in private sexual conduct. Conceding that *Lawrence* must have done *something,* the majority acknowledges that *Lawrence* "established the unconstitutionality of criminal prohibitions on consensual adult sodomy." Majority Op. at 1236. The majority refuses, however, to acknowledge *why* the Court in *Lawrence* held that criminal prohibitions on consensual sodomy are

unconstitutional. This failure underlies the majority's flawed conclusion in this case.

As explained more fully below, *Lawrence* held that a state may not criminalize sodomy because of the existence of the very right to private sexual intimacy that the majority refuses to acknowledge. *Lawrence* reiterated that its prior fundamental rights cases protected individual choices "concerning the intimacies of [a] physical relationship." *Lawrence,* 123 S.Ct. at 2483 (internal quotation marks and citation omitted). Because of this precedent, the *Lawrence* Court overruled *Bowers,* concluding that *Bowers* had "misapprehended the claim of liberty there presented" as involving a particular sexual act rather than the broader right of adult sexual privacy. *Id.* at 2478. Instead of heeding the Supreme Court's instruction regarding *Bowers*' error, the majority *repeats* it, ignoring *Lawrence*'s teachings about how to correctly frame a liberty interest affecting sexual privacy.

Compounding this error, the majority also ignores *Lawrence*'s holding that although history and tradition may be used as a "starting point," they are not the "ending point" of a substantive due process inquiry. *Id.* at 2480 (internal quotation marks and citation omitted). In cases solely involving adult consensual sexual privacy, the Court has never required that there be a long-standing history of *affirmative* legal protection of *specific conduct* before a right can be recognized under the Due Process Clause. To the contrary, because of the fundamental nature of this liberty interest, this right has been protected by the Court despite historical, legislative *restrictions* on private sexual conduct.[1] Applying the analytical framework of *Lawrence* compels the

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[1] *See Roe v. Wade,* 410 U.S. 113, 139, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *see also Carey v. Population Services Int'l,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

conclusion that the Due Process Clause protects a right to sexual privacy that encompasses the use of sexual devices.[2]

Finally, even under the majority's own constrained and erroneous interpretation of *Lawrence,* we are, at a bare minimum, obliged to revisit this Court's previous conclusion in *Williams v. Pryor,* 240 F.3d 944 (11th Cir.2001) ("*Williams II*"), that Alabama's law survives the most basic level of review, that of rational basis. *See* 240 F.3d at 949. That decision explicitly depended upon the finding in *Bowers* that the promotion of public morality provided a rational basis to restrict private sexual activity. *Id.* While the majority recognizes that *Bowers* has been overruled, it inexplicably fails to offer any explanation whatsoever for why public morality provides a rational basis to criminalize the private sexual activity in this case, when it was clearly not found to be a legitimate state interest in *Lawrence.*

For all of these reasons, which are amplified below, I dissent.

## I. Lawrence Recognized a Substantive Due Process Right to Sexual Privacy.[3]

There is no question that *Lawrence* was decided on substantive due process grounds. The doctrine of substantive due process requires, first, that *every* law must address in a relevant way only a legitimate governmental purpose. In other words, no law may be arbitrary and capricious but

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[2] As the majority acknowledges, there is no constitutional distinction between a ban on the private use of sex toys and a ban on the sale of sex toys. *See* Majority Op. at 1242 ("For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item."). Accordingly, Alabama cannot be permitted to accomplish indirectly what it is not constitutionally permitted to do directly.

[3] I have also developed these arguments in my dissent to the denial of rehearing en banc in *Lofton v. Sec. of Dept. of Children and Family Servs.,* 358 F.3d 804, (11th Cir.2004) (Barkett, J., dissenting).

rather must address a permissible state interest in a way that is rationally related to that interest. As a consequence, any law challenged as violating a substantive due process right must survive rational-basis review.

However, the Supreme Court has found that some decisions are so fundamental and central to human liberty that they are protected as part of a right to privacy under the Due Process Clause,[4] and the government may constitutionally restrict these decisions only if it has *more* than an ordinary run-of-the-mill governmental purpose.[5] In such cases, the Court subjects these governmental restrictions to a heightened scrutiny, requiring that legislation be "narrowly drawn" to achieve a "compelling state interest."[6] Included within this right to privacy is the ability to make decisions about intimate sexual matters.[7]

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[4] The Supreme Court has explained that this right includes the ability of adults to make decisions relating to the right to abortion, *Roe*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; contraception, *Eisenstadt*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 and *Griswold*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; marriage, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

[5] The majority acknowledges that at issue in this case is "the Due Process Clause's substantive component, which courts have long recognized as providing 'heightened protection against government interference with certain fundamental rights and liberty interests.'" Majority Op. at 1235 (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000)).

[6] *Roe*, 410 U.S. at 155, 93 S.Ct. 705 ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest" and that such legislation "must be narrowly drawn") (internal quotation marks and citation omitted). The only sexual privacy case where the Court did not use this language was in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), where it analyzed civil burdens on a woman's right

In invalidating the sodomy statute at issue in *Lawrence*, the Court reaffirmed this right to sexual privacy, finding that private homosexual conduct is likewise encompassed within it. From its opening paragraph, the Court explained the importance of the liberty at issue here:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence ... The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

*Lawrence*, 123 S.Ct. at 2475. The *Lawrence* Court noted in its opinion that it had granted certiorari specifically to consider "[w]hether Petitioners' criminal convictions for *adult consensual sexual intimacy in the home* violate their *vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?*" *Id.* at 2476 (internal quotation marks and citation omitted) (emphasis added). While the Court also granted certiorari to address whether Texas's sodomy statute violated the Equal Protection Clause,[8] the Court explicitly decided to rest its

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to abortion, not an outright criminal ban. The Court found that a state regulation that had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" would place an "undue burden" on the right to abortion and therefore be unconstitutional. *Casey*, 505 U.S. at 877, 112 S.Ct. 2791.

[7] *See, e.g., Carey*, 431 U.S. at 685, 97 S.Ct. 2010 and *Griswold*, 381 U.S. at 486, 85 S.Ct. 1678 (right to use contraception); *Casey*, 505 U.S. at 869, 112 S.Ct. 2791 (right to seek out an abortion).

[8] Unlike the sodomy statute at issue in *Lawrence*, which only applied to homosexual sexual conduct, the Georgia statute in *Bowers* criminalized acts of sodomy engaged in by both heterosexuals and homosexuals. *See Bowers*, 478 U.S. at 188 n. 1, 106 S.Ct. 2841. The

holding on a substantive due process analysis because it found that if a sodomy law "remain[ed] unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[9] *Id.* at 2482. The Court stated that the "case should be resolved by determining whether the petitioners were free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id.* at 2476.

In resolving this issue of whether the petitioners were "free as adults" to engage in "private [sexual] conduct," the Court retraced its substantive due process jurisprudence by discussing the fundamental rights cases of *Griswold, Eisenstadt*,[10] *Roe*, and *Carey* and emphasized the breadth of their holdings as involving private decisions regarding intimate physical relationships. *Id.* at 2476-77, 2483. Beginning with *Griswold*, the *Lawrence* Court found that its prior decisions confirmed "that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person" and "that the right to make certain decisions

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*Lawrence* Court indicated that the sodomy statute could have been invalidated using an equal protection analysis. 123 S.Ct. at 2482. Indeed, this was the conclusion of Justice O'Connor in her concurrence. *Id.* at 2484-88 (O'Connor, J., concurring).

[9] The *Lawrence* majority went on to state that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 123 S.Ct. at 2482.

[10] Although *Eisenstadt* was decided on equal protection grounds, the Court in *Lawrence* noted that *Eisenstadt* "went on to state the fundamental proposition that the law impaired the exercise of ... personal rights." 123 S.Ct. at 2477. Further, while *Lawrence* cited *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), as an example of how *Bowers* had been cast into doubt, the Court immediately declined to decide the case under *Romer*'s equal protection rationale, instead insisting that the decision be resolved on substantive due process grounds. *Id.* at 2482.

regarding sexual conduct extends beyond the marital relationship." *Id.* at 2477 (summarizing *Griswold, Eisenstadt, Roe,* and *Carey*).

Because of the existence of this right to make private decisions regarding sexual conduct, the *Lawrence* Court was compelled to overrule the anomaly of *Bowers,* which had failed to acknowledge this right in permitting Georgia to criminalize sodomy. *See Bowers,* 478 U.S. at 194-96, 106 S.Ct. 2841. *Lawrence* found that at the time of the *Bowers* decision the Court's prior holdings had already made "abundantly clear" that individuals have a substantive due process right to make decisions "concerning the intimacies of their physical relationship[s], even when not intended to produce offspring." 123 S.Ct. at 2483 (quoting *Bowers,* 478 U.S. at 216, 106 S.Ct. 2841 (Stevens, J., dissenting)). The *Lawrence* Court therefore concluded that "*Bowers* was not correct *when it was decided.*" *Id.* at 2484 (emphasis added).

Given these statements in *Lawrence,* I fail to understand the majority's reliance on a footnote from the Supreme Court's 1977 decision in *Carey,* where the Court indicated in dicta that it had not "definitively answered" the extent to which the Due Process Clause protects the private sexual conduct of consenting adults. Majority Op. at 1236, 1237 (citing *Carey,* 431 U.S. at 688 n. 5, 97 S.Ct. 2010).[11] Obviously, *Carey* does not resolve in any way the meaning of a case that comes twenty-six years later. Nor does it prevent *Lawrence* from answering the very question posed in *Carey*'s footnote. *Lawrence* does precisely this in affirming the right of consenting adults to make private sexual decisions. Moreover, this could not have been a new right. *Carey*'s footnote notwithstanding, the *Lawrence* Court

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[11] In *Carey,* the Court wrote that it had "not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults." 431 U.S. at 688 n. 5, 97 S.Ct. 2010 (internal quotation marks and citation omitted).

determined that its pre-*Bowers* decisions had already recognized a right to sexual privacy. This is the only way to make sense of the *Lawrence* Court's statements that *Bowers* was "not correct when it was decided," and that its decisions before *Bowers* had already made "abundantly clear" that adults have a right to make decisions "concerning the intimacies of their physical relationship[s]." *Lawrence*, 123 S.Ct. at 2483-84 (internal quotation marks and citation omitted).

In light of the Court's conclusion that its prior decisions in *Griswold, Eisenstadt, Carey*, and *Roe* had already made "abundantly clear" that adults have a right to make intimate decisions about their sexual relationships, the majority cannot seriously maintain that this dissent "never identifies" a precedential source of the right to sexual privacy. Majority Op. at 1237. The majority's argument that this dissent fails to identify a textual source of the right to sexual privacy is equally untenable. *Id.* As noted below, the *Lawrence* Court held that the petitioners' "*right to liberty under the Due Process Clause* gives them the full right to engage in their [private sexual] conduct without intervention of the government." 123 S.Ct. at 2484 (emphasis added). The Court could not have been more clear that the petitioners' right to engage in private sexual conduct has its textual locus in the Due Process Clause.

*Bowers* erred because it "misapprehended the claim of liberty there presented" when it framed the issue before it as whether the Constitution protects "a fundamental right to engage in consensual sodomy":

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. *The laws involved in* Bowers *and here are, to be sure, statutes*

> *that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.*

*Lawrence*, 123 S.Ct. at 2478 (emphasis added). In other words, *Bowers* departed from the proper inquiry by focusing on a particular sexual act instead of upon the right to sexual privacy, which encompasses acts of adult consensual sexual intimacy. As I explain in the next section, the majority repeats the very mistake made in *Bowers* by focusing on whether there is a right to engage in a particular sexual act—here the use of sexual devices—rather than asking whether the conduct burdened by Alabama's statute involves private consensual sexual intimacy. As *Lawrence* demonstrates, sexual intimacy is inevitably demeaned, and its importance to the private life of the individual trivialized, when it is reduced to a particular sexual or physical act.

As the *Lawrence* Court explained, the proper inquiry is simply whether adults have a right to engage in "private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id.* at 2476. In answering this question, *Lawrence* expressly adopted the reasoning of Justice Stevens' dissent in *Bowers:*

> [I]ndividual decisions by married persons, *concerning the intimacies of their physical relationship,* even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

*Id.* at 2483 (quoting *Bowers*, 478 U.S. at 216, 106 S.Ct. 2841

(Stevens, J., dissenting)) (emphasis added). Because the private conduct at issue in *Lawrence* also concerned the "intimacies" of a "physical relationship," the Court held that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[12] *Id.* at 2484. The *Lawrence* Court's answer to its question of whether adults have a right to engage in private sexual conduct is clearly a binding holding. I know of no principle of interpretation that supports, in any way, the majority's characterization as "scattered *dicta*"[13] the Supreme Court's direct response to

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[12] The majority argues that acknowledging a right of adult sexual privacy would lead to the invalidation of laws banning, among other things, prostitution, incest, the use of hallucinogenic substances, child pornography, and bestiality. *See* Majority Op. at 1239, 1240 n. 12. Here again, the majority fails to credit *Lawrence*, which clearly stated, for purposes of guiding future courts, what the right of consensual adult sexual privacy is and is not about:

> The present case does not involve minors. It does not involve *persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.* It does not involve public conduct or *prostitution.* It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

123 S.Ct. at 2484 (emphasis added). As the Court explained, as a "general rule," the state or a court should not attempt "to define the meaning of [a] relationship or to set its boundaries *absent injury to a person or abuse of an institution the law protects.*" *Id.* at 2478 (emphasis added). For example, in the case of prostitution, there may be a threat that individuals will be harmed, while adult incest poses a threat to the institution of the family and involves a "relationship[ ] where consent might not easily be refused." *Id.* at 2484.

[13] Majority Op. at 1236.

the question it granted certiorari to answer and that it found was necessary to resolve before disposing of the case. *See id.* at 2476 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.").

Like both *Bowers* and *Lawrence,* this case involves "the most private human conduct, sexual behavior," occurring "in the most private of places, the home." *Lawrence,* 123 S.Ct. at 2478. Alabama's statute, by prohibiting the sale of sexual devices, thus affects the same "vital" liberty interest in adult consensual sexual intimacy threatened by the sodomy statutes in *Bowers* and *Lawrence* and should likewise be invalidated.[14] I believe the majority errs in its strained effort to avoid the fair import of a Supreme Court precedent.

## II. The Majority Ignores Lawrence's Teaching Regarding the Proper Framing of a Liberty Interest and the Appropriate Use of History.

Because the majority erroneously concludes that *Lawrence* did not reaffirm a substantive due process right to sexual privacy, it attempts to conduct a *Glucksberg* analysis with respect to whether to recognize a "hitherto unarticulated fundamental right." Majority Op. at 1234, 1240. In doing so, the majority not only errs by proceeding as if *Lawrence* and its prescriptions for conducting a fundamental rights analysis do not exist, but also errs by inventing new criteria that are

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[14] As the majority acknowledges, the Supreme Court has held that the "same test must be applied to state regulations that *burden* an individual's right ... by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." Majority Op. at 1242 (quoting *Carey,* 431 U.S. at 688, 97 S.Ct. 2010).

not supported by *Glucksberg*, *Flores*, or any other case law.[15]

Regardless of the majority's belief that *Lawrence* did not recognize a substantive due process right, it cannot then simply conduct an analysis that ignores *Lawrence*'s clear statements about the erroneous analytical framework of *Bowers* and repeat that methodology here. Even if *Lawrence* were not itself a fundamental rights decision, it remains the case that *Bowers* conducted a fundamental rights analysis that *Lawrence* found to be deeply flawed. *Lawrence*'s repudiation of *Bowers*' substantive due process approach cannot be dismissed as dicta, since overruling *Bowers* was necessary to the disposition of the decision in *Lawrence*. *Lawrence*, 123 S.Ct. at 2476 ("[W]e deem it necessary to reconsider the Court's holding in *Bowers*."). Therefore, *Lawrence*, coming after *Glucksberg*, must be read as providing binding guidance about how to properly analyze a liberty interest affecting sexual privacy.

### A. The Proper Framing of a Liberty Interest

Just as the *Bowers* Court framed the question before it as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," *Bowers*, 478 U.S. at 190, 106 S.Ct. 2841, the majority also mistakenly reduces the asserted liberty interest here to a particular sexual act, asking not whether consenting adults have a right to sexual privacy, but whether an Alabama citizen has the right to use sex toys.[16] *See, e.g.*, Majority Op.

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[15] *See Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[16] The majority erroneously insists that "the scope of the liberty interest at stake here must be defined in reference to the scope of the Alabama statute," Majority Op. at 1241, even though *Lawrence* recognized that the liberty interest threatened by sodomy statutes could not be defined by the particular conduct those statutes prohibited.

at 1241. The *Lawrence* Court explained that the narrow framing of the question in *Bowers* "demean[ed] the claim" set forth and "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake" in that case. 123 S.Ct. at 2478 (*Bowers* "misapprehended the claim of liberty there presented to it"). The *Lawrence* Court further explained that "[t]he laws involved in *Bowers* and here are, to be sure, statutes that *purport to do no more than prohibit a particular sexual act.* Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 2478 (emphasis added). In exactly the same manner, the majority's characterization of the right at issue here as involving the right to use certain sexual devices severely discounts the extent of the liberty at stake in this case. Alabama's law not only restricts the sale of certain sexual devices, but, like the statute in *Lawrence,* burdens private adult sexual activity within the home.[17]

**B. The Use of History and Tradition**

In addition to repeating the analytical mistake of *Bowers* in narrowly framing the right at issue, the majority also errs in its use of history. The majority claims that under

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Selectively quoting from the district court's opinion, the majority repeatedly insists that the right at issue here is the "right to use sexual devices like ... vibrators, dildos, anal beads, and artificial vaginas." Majority Op. at 1244, 1247, 1250. In contrast to the majority, the district court properly framed the question in terms of the broader right to sexual privacy. The district court framed the inquiry as follows: "Does th[e] fundamental right of sexual privacy between married and unmarried adults in private, consensual, sexual relationships encompass a right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas distributed by the vendor plaintiffs in this action?" *Williams v. Pryor,* 220 F.Supp.2d 1257, 1296 (N.D.Ala.2002) ("*Williams III*").

[17] *See* Majority Op. at 1242 ("For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item.").

*Glucksberg*, the district court was wrong to rely on a history and tradition of state *non-interference* with the private sexual lives of adults as a basis to recognize a right to sexual privacy.[18] According to the majority, *Glucksberg* requires that there be a long-standing history of *affirmative* legal protection of *specific conduct* before a right can be recognized under the Due Process Clause.[19]

Contrary to the majority's claim, neither *Glucksberg* nor any other relevant Supreme Court precedent supports the requirement that there must be a history of affirmative legislative protection before a right can be judicially protected. The majority simply invents this requirement, effectively redefining the doctrine of substantive due process to protect only those rights that are *already* explicitly protected by law. Such a requirement ignores not only *Lawrence* but also a complete body of Supreme Court jurisprudence. Had the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently. For instance, there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause.[20] In its analysis, the trial court here

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[18] The district court found that "history and contemporary practice demonstrate a conscious avoidance of regulation of [sexual] devices by the states." *Williams III*, 220 F.Supp.2d at 1296. The majority dismisses this analysis. *See* Majority Op. at 1242 ("[R]ather than look for a history and tradition of *protection* of the asserted right, the district court asked whether there was a history and tradition of state *non-interference* with the right.").

[19] Majority Op. at 1244 (noting that the district court's analysis was "not based on any evidence of a history and tradition of *affirmative protection* of this right [to use sexual devices]").

[20] In *Roe*, for instance, the Court's historical analysis of Anglo-American statutory and common law served to provide evidence of the relatively recent (late nineteenth-century) vintage of state restrictions on abortion, not to demonstrate a tradition of affirmative protection of the right to an abortion. 410 U.S. at 132-41, 93 S.Ct. 705. Despite the lack of

correctly considered the history of non-interference by government. Its analysis was expressly validated by *Lawrence,* in which there was no history of affirmatively protecting the right to engage in consensual sodomy. In overruling *Bowers,* the *Lawrence* Court noted with approval Justice Powell's observation in *Bowers* that "*[t]he history of nonenforcement* [of sodomy laws] suggests the moribund character today of laws criminalizing this type of private, consensual conduct." 123 S.Ct. at 2481 (internal quotation marks and citation omitted) (emphasis added). Therefore, the majority is plainly incorrect that there must be a history and tradition of laws protecting the right to use sex toys.[21]

Moreover, while history and tradition can be important factors, they are not the only relevant considerations in a substantive due process inquiry related to sexual privacy. *See id.* at 2480-81. As the *Lawrence* Court emphasized, "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 2480 (internal quotation marks and citation omitted). Furthermore, like the district court in this case, *Lawrence* looked to modern trends and practices. The *Lawrence* Court wrote:

> [W]e think that *our laws and traditions in the past half century are of most relevance here.* These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to *conduct their private lives in matters pertaining to sex.*

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a history of protecting the right to abortion, the *Roe* Court nevertheless held that the "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 152-56, 93 S.Ct. 705.

[21] The majority also claims that the district court should have limited its historical analysis to legislation involving the use of sexual devices. The proposal for such an unjustifiably narrow inquiry flows from the majority's error in framing the right at issue too narrowly.

*Id.* (emphasis added). Given this unequivocal statement, the majority cannot legitimately criticize the district court for its attention to "contemporary practice and attitudes with respect to sexual conduct and sexual devices." Majority Op. at 1242. In light of all relevant Supreme Court precedents, the trial court—not the majority—strikes the proper balance between a concern with history and contemporary practice, and articulates a careful and correct description of the asserted liberty interest.[22]

## III. Under Lawrence, "Public Morality" Cannot Be Deemed a Legitimate Governmental Purpose for Criminalizing Private Sexual Activity.

The majority states that *Lawrence* held that sodomy laws fail rational-basis review.[23] However, the majority neglects to address whether Alabama's statute has a rational basis even though Alabama relies upon the same justification for criminalizing private sexual activity rejected by *Lawrence*—public morality. In *Lawrence,* Texas had explicitly relied upon public morality as a rational basis for its sodomy law.[24] *Lawrence* summarily rejected Texas's

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[22] *Williams III,* 220 F.Supp.2d at 1259, 1296 ("[P]laintiffs' evidence establishes that there exists a constitutionally inherent right to sexual privacy that firmly encompasses state *non-interference* with private, adult, consensual sexual relationships" and that this right, "even in its narrowest form, protects plaintiffs' use of sexual devices like those targeted" by Alabama's law).

[23] Majority Op. at 1236 (noting that *Lawrence* "ultimately applied rational-basis review" to strike down Texas's sodomy statute).

[24] Respondent's Brief in Lawrence v. Texas, 2003 WL 470184 at * 48 (U.S. Feb. 7, 2003) ("The prohibition of homosexual conduct in [Texas' sodomy statute] represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred.... [L]ong-established principles of federalism dictate that the Court defer to the Texas Legislature's judgment and to the collective good sense of the people of the State of Texas, in their effort to enforce public morality and promote family values through the promulgation of penal statutes such as

argument, holding that the sodomy law "further[ed] *no* legitimate state interest which can justify its intrusion into the personal and private life of the individual." 123 S.Ct. at 2484 (emphasis added). In *Williams II,* this Court previously upheld Alabama's law on rational basis grounds, relying on the now defunct *Bowers* to conclude that public morality provides a legitimate state interest. 240 F.3d at 949-50 (the "crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny"). Obviously, now that *Bowers* has been overruled, this proposition is no longer good law and we must, accordingly, revisit our holding in *Williams II.*[25] Yet despite the *Lawrence* Court's rejection of public morality as a legitimate state interest that can justify criminalizing private consensual sexual conduct, the majority, although acknowledging that the district court will have to do so, never once addresses how our holding in *Williams II* can remain good law. Justice Scalia, in his *Lawrence* dissent, specifically noted that the principles we

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[the sodomy statute].") (internal footnote omitted) (emphasis added); see also Transcript of Oral Argument in Lawrence v. Texas, 2003 WL 1702534 at * 38 (U.S. March 26, 2003) (state's counsel arguing that sodomy law was justified because "Texas has the right to set moral standards and can set bright line moral standards for its people.").

[25] The majority states that "[t]he only question on this appeal is whether the [Alabama] statute, as applied to the involved users and vendors, violates any fundamental right protected under the Constitution." Majority Op. at 1234. Appellants, however, claim that Alabama's statute violates the Due Process Clause, which necessarily includes a claim that the statute fails rational-basis review. On remand, the district court must consider whether our holding in *Williams II* that Alabama's law has a rational basis remains good law now that *Bowers* has been overruled. *See, e.g., Venn v. St. Paul Fire & Marine Ins. Co.,* 99 F.3d 1058, 1063 (11th Cir.1996) (noting that the "law of the case ... does not apply to bar reconsideration of an issue when ... controlling authority has since made a contrary decision of law applicable to that issue").

relied upon in our decision in *Williams II* have been "discarded" by *Lawrence:*

> It seems to me that the "societal reliance" on the principles confirmed in Bowers and *discarded today* has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. *See, e.g., Williams v. Pryor*, 240 F.3d 944, 949 (C.A.11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality ... indisputably is a legitimate government interest under rational basis scrutiny").

123 S.Ct. at 2490 (Scalia, J., dissenting) (emphasis added).

Whether Alabama's legislature believes that the use of sex toys may be improper or immoral, the Supreme Court has explained that "[t]hese considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* at 2480 (discussing traditional moral views disapproving of homosexuality) (internal quotation marks and citation omitted).

## IV. Conclusion

For all the reasons explicated above, Alabama's statute should be invalidated because it violates a substantive due process right of adults to engage in private consensual sexual activity and because the state's reliance on public

morality fails to provide even a rational basis for its law. Ignoring *Lawrence*, the majority turns a reluctance to expand substantive due process into a stubborn unwillingness to consider relevant Supreme Court authority. I dissent.

**APPENDIX E**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-16135-DD

SHERRI WILLIAMS,
B.J. BAILEY,
ALICE JEAN COPE,
JANE DOE,
DEBORAH L. COOPER,
BENNY COOPER,
DAN BAILEY,
JANE POE,
JANE ROE,

Plaintiffs-Appellees,

versus

ATTORNEY GENERAL OF ALABAMA,

Defendant-Appellant,

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On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: BIRCH, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)